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THE
ONTARIO LAW REPORTS.

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1910.

REPORTED UNDER THE AUTHORITY OF THE
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JUDGES
OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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*Died 17th January, 1911.

CALL TO THE BAR.

In Michaelmas Term, 1910, the following gentlemen were called to the Bar:—

FREDERICK RIELY.

JEREMIAH WILFRED HEFFERNAN.

JAMES OSWALD BEGG.

ARTHUR RUSSELL NESBITT.

PERCY ALGERNON LYNCH.

In Hilary Term, 1911, the following gentlemen were called to the Bar:—

THOMAS REGINALD JAMES WRAY.

ARTHUR FLYNN.

ERRATA.

- Page 269, 4th line of head-note: for "ch. 145," read "ch. 245."
" 277, 16th line from top: for "O.L.R. 142," read "O.R. 142."
" 279, 7th line from top: for "O.L.R. 142," read "O.R. 142."
" 282, 9th line from bottom: for "ch. 194," read "ch. 245."

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REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[IN CHAMBERS.]

COLVILLE V. SMALL.

1910

Sept 19.

*Parties—Action by Assignee-trustee—Absolute Assignment—Status of Plaintiff
—Addition of Assignors—Motion in Chambers.*

When an assignment is absolute in form, it is immaterial, as regards the status of the assignee as plaintiff in an action, relying upon his title under the assignment, that the assignee holds in trust, and it is also immaterial that the assignor is himself beneficially interested as an object, or indeed as the sole object, of the trust.

And where an assignment of a claim for money for work done was absolute in form, and the assignee held in trust to divide the proceeds of the litigation between himself and his assignors, an order, made on the application of the defendant, directing that the assignors be added as plaintiffs, was reversed.

And *held*, that, upon such a motion, it could not be determined that the assignment was a "sham."

Comfort v. Betts, [1891] 1 Q.B. 737, *Weisener v. Rackow* (1897), 76 L.T.R. 448, and *Fitzroy v. Cave*, [1905] 2 K.B. 364, followed.

Mills v. Small (1907), 14 O.L.R. 105, distinguished.

An appeal by the plaintiff from an order of one of the Local Judges at Hamilton, made upon the application of the defendant, directing that Remo Gori & Co. and A. Barbi be added as plaintiffs, within thirty days, upon their written consents being filed.

The action was brought to recover the balance alleged to be due for work done, by the persons so added, for the defendant, the plaintiff alleging an assignment of the claim to him and due notice to the defendant.

September 16. The appeal was heard by MIDDLETON, J., in Chambers.

*W. M. McClemon*t, for the plaintiff.

J. L. Counsell, for the defendant.

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September 19. MIDDLETON, J.:—The motion to add was at the instance of the defendant, and is resisted by the plaintiff, who relies upon his own title under the assignment. The assignment is absolute in form. The assignee holds in trust to divide the proceeds of the litigation between himself and his assignors. When an assignment is absolute in form, it is quite immaterial that the assignee holds in trust, and it is also immaterial that the assignor is himself beneficially interested as an object, or indeed as the sole object, of the trust: *Comfort v. Betts*, [1891] 1 Q.B. 737. In that case there was no suggestion (even if the facts would warrant it) that the assignment offended against public policy as savouring of maintenance or champerty.

In *Weisener v. Rackow* (1897), 76 L.T.R. 448, Bruce, J., held that an assignment absolute in form was not within the Act, because the assignee admitted that he held in trust for the assignors and practically as their agent. This decision was reversed upon appeal, upon the authority of *Comfort v. Betts*. The document, in the opinion of the Court, evidenced a real transaction not prohibited by law, namely, a vesting of the chose in action in the plaintiff absolutely, though in trust, and it could not be described as a “sham.”

In *Fitzroy v. Cave*, [1905] 2 K.B. 364, the claims were assigned to a trustee to collect and pay costs and hand over the balance to the assignors. The trustee procured the assignment to enable him to have the debtor adjudicated a bankrupt and so removed from the directorate of a company. The validity of the assignment was attacked upon the ground of maintenance and invalidity by reason of the motive with which it was procured. The Court of Appeal negatived both of these contentions, and Cozens-Hardy, L.J., delivering the judgment of the majority of the Court, says: “Henceforth in all Courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods. And on principle I think it is not possible to deny the right of the owner of any property capable of legal assignment to vest that property in a trustee for himself, and thereby to confer upon such trustee a right of indemnity. . . . The Court is not asked to exercise any discretionary jurisdiction. If the assignment is valid at all, it is valid in all Courts, and the plaintiff is entitled to judgment *ex debito iustitiæ*.” From the fact that no greater right than an indemnity as to costs was given to the trustee-assignee, it was not,

as pointed out, a case of maintenance at all, and the motive of the assignee in accepting the trust was quite immaterial. *Comfort v. Betts* is again assumed to have determined the point that an assignment to a trustee is an "absolute assignment."

This case was not cited to Mr. Justice Riddell in *Mills v. Small* (1907), 14 O.L.R. 105, where he held that an assignment absolute in form to an agent or trustee for the purpose of collection was a "sham assignment," not sufficient to enable the assignee to sue in his own name. This holding was based on a finding of fact, upon evidence at the hearing, establishing to the satisfaction of the Judge that the assignment was a "sham."

I am saved from considering whether this case is in conflict with the English cases, and whether, even if it is, it is binding upon me, because I cannot upon this motion determine the issue of fact suggested.

The plaintiff has the right to go to trial, and the learned Judge ought not to have made an order requiring the addition of the assignors as parties plaintiff.

How the order would be worked out, in the event of the assignors refusing to join, is not clear, as the order imposes no interim stay, and provides no penalty if its terms are not complied with.

If the plaintiff was a nominal plaintiff and insolvent, the defendant could be protected by an order for security for costs. His counsel admits that, upon the facts of this case, he could not succeed upon such a motion.

If the defendant desires to contend that, by reason of the plaintiff having an interest given him in the proceeds of the litigation, the assignment is champertous, and the case differs from and is not governed by *Fitzroy v. Cave* for this reason, this defence must be raised at the hearing, and possibly ought to be pleaded.

The appeal must be allowed and the motion dismissed. Costs to the plaintiff in any event.

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[DIVISIONAL COURT.]

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Malicious Prosecution—Reasonable and Probable Cause—Advice of Counsel or Solicitor—Honest Disclosure of Facts—Bona Fides in Acting upon Advice—Functions of Judge and Jury—Uncontradicted Evidence—Nonsuit.

In an action for the malicious prosecution of the plaintiff for perjury, it appeared, upon uncontradicted testimony, that the defendant, as soon as he saw the statutory declaration of the plaintiff which contained the statements concerning the defendant (amounting to a charge of fraud or theft) alleged to be false, upon which the prosecution was based, consulted his solicitor, who, before advising, obtained statements from two men who were referred to in the plaintiff's declaration as being ready to substantiate the statements made by him; these men contradicted the plaintiff; the solicitor then placed the whole facts before the County Crown Attorney, who advised an information, which the defendant then laid:—

Held, there being no evidence upon which a jury could fairly pronounce that the defendant had a guilty knowledge of the fraud charged, or that there was a lack of *bona fides* in what he did in laying the matter before his solicitor, that the trial Judge was right in determining that there was reasonable and probable cause for the prosecution, and in withdrawing the case from the jury and dismissing the action.

Per MIDDLETON, J.:—The opinion of counsel honestly obtained, after a full disclosure of the facts known to the defendant, and honestly acted upon, constitutes reasonable and probable cause for the prosecution, and is not merely evidence either of reasonable and probable cause or in answer to the charge of malice; and in a case where a lawyer of experience and standing is called and shews that he advised the proceedings, and that the facts were fully known to him at the time the advice was given, and the defendant shews that he acted in good faith upon the advice so given, the trial Judge, in the absence of any contradictory evidence, is only discharging his judicial functions when he finds that there was reasonable and probable cause, and enters judgment for the defendant.

AN appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., withdrawing the case from the jury, and dismissing the action with costs.

The action was for malicious prosecution. The plaintiff, an accountant, made a statutory declaration containing certain statements which reflected upon the defendant. The defendant, upon the advice of his solicitor, laid an information against the plaintiff for perjury. The plaintiff was acquitted, and brought this action. The defence was that there was reasonable and probable cause for the prosecution, all the facts having been laid before his solicitor by the defendant, and the proceedings complained of having been taken on his advice. The facts are more fully stated in the judgment of CLUTE, J.

June 6. The appeal was heard by a Divisional Court composed of CLUTE, SUTHERLAND, and MIDDLETON, JJ.

R. S. Robertson, for the plaintiff. The learned trial Judge erred in withdrawing the case from the jury, as there was evidence that should have gone before them, that the defendant knew that the plaintiff was innocent, in which case the fact that the defendant acted on his solicitor's advice would not assist him. There was also evidence that the defendant failed to lay the facts of the case fairly before his solicitor, and that he did not act in good faith upon the advice which he received. The plaintiff was entitled to have the jury asked whether the written statement was what was submitted to the solicitor. The following cases were referred to: *Wilson v. Tennant* (1894), 25 O.R. 339; *Reed v. Taylor* (1812), 4 Taunt. 616; *Ellis v. Abrahams* (1846), 8 Q.B. 709; *Delisser v. Towne* (1841), 1 Q.B. 333; *The King v. Prosser*, cited in *Johnstone v. Sutton* (1786), 1 T.R. 510, at p. 533.

I. F. Hellmuth, K.C., for the defendant. The evidence shews that the defendant made a full disclosure of all the facts in the case to his solicitor, and that he was not in any way actuated by malice. *St. Denis v. Shoultz* (1898), 25 A.R. 131, shews that absence of reasonable and probable cause is not in itself sufficient to impose liability: see also *Corea v. Peiris*, [1909] A.C. 549. The case should only be left to the jury where there is a conflict of evidence as to whether or not there has been a full disclosure to the solicitor. Where the evidence is all one way in shewing that there has been such a disclosure, and that the defendant has acted in good faith on the advice received, the Judge should withdraw the case from the jury, following the general rule as laid down in *Newell on Malicious Prosecution*, p. 210, that when these facts are proved, "the absence of malice is established, the want of probable cause is negatived, and the action for malicious prosecution will not lie." He also referred to *Horsley v. Style* (1893), 9 Times L.R. 605; *Willinsky v. Anderson* (1909), 19 O.L.R. 437; *Hamilton v. Cousineau* (1892), 19 A.R. 203.

Robertson, in reply, referred to Clerk and Lindsell on Torts, 4th ed., p. 644; *Taylor v. Willans* (1831), 2 B. & Ad. 845; *Ravenga v. Mackintosh* (1824), 2 B. & C. 693, at p. 697; *Woods v. Plummer* (1908), 15 O.L.R. 552. *Horsley v. Style* is a case turning on the interpretation of a statute, and is not an authority in the present instance.

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September 20. CLUTE, J.:—Appeal from the judgment of the Chief Justice of the King's Bench withdrawing the case from the jury, and dismissing the action with costs.

The action is for malicious prosecution, and the question to be decided is whether the case was properly withdrawn from the jury.

It is asserted for the defence that all the facts were fully laid before a solicitor by the defendant, and that on the solicitor's advice the proceedings complained of were taken.

The trial Judge was at first inclined to leave the case to the jury "to determine whether all the facts had been fully laid before the solicitor, or whether there was a want of good faith in the matter," but came to the conclusion that he "would not be justified in doing that, because the evidence is all one way."

Mr. Robertson strongly urged that the evidence shews that Bilsky did not act in good faith; that the alleged facts upon which he sought to obtain the solicitor's advice to take the proceedings in question were false to his knowledge; that the plaintiff's declaration was in fact true, and the defendant knew it to be true at the time he laid the information, and so it was a mere pretence to lay the matter before the solicitor.

The plaintiff is an accountant; the defendant is manager of the Nova Scotia Silver Cobalt Mining Company. In October, 1908, the defendant engaged the plaintiff as bookkeeper, and he lived in the boarding-house at the mines until the following April. The Nova Scotia company worked the Peterson Lake mine under lease, with a common directorate and management, paying a royalty on the gross amount mined. Some of the shareholders of the Peterson Lake company became dissatisfied, and a meeting was called to inquire into the management; it being charged that the Peterson Lake company was not getting justice. The plaintiff, under these circumstances, wrote a letter and on the same day made a statutory declaration which contains the statement complained of. It is as follows:—

"With regard to the disposition of the ore on the Nova Scotia lease from Peterson Lake, there is no means of checking the same either on surface or below, and the head ore-sorter, who superintends the bagging of ore, takes his instructions from the managing director, and only a certain portion is credited to Peterson Lake, and nearly all the leaf silver which comes from Peterson Lake is

bagged and shipped as Nova Scotia ore. The above can be verified by Mr. R. F. Taylor, who was formerly superintendent of the Nova Scotia mine, and who is now with the Kerr Lake mine, and also by Mr. James Carr, who is head ore-sorter at the Nova Scotia mine."

The managing director above referred to is the defendant, who thereupon consulted his solicitor. The solicitor, before advising as to the propriety of laying an information, obtained the affidavits of Taylor and Carr, the men referred to in the declaration.

Taylor and Carr distinctly contradict the statements in the letter which the plaintiff said they would verify.

The gravamen of the charge in the letter, as I read it, is that the head ore-sorter, who superintends the bagging of ore, takes his instructions from the managing director, and only a certain portion of the ore is credited to the Peterson Lake company, and nearly all the leaf silver which comes from the Peterson Lake mine is bagged and shipped as Nova Scotia ore.

It was, in sort, a charge of fraud, amounting to theft, against the managing director; and the captain of the mine and the head ore-sorter are referred to as the persons who can prove it. They disprove it. They contradict the plaintiff. Their declarations are obtained before the solicitor advises. He does not then act, but places the whole case before the County Attorney, who advises an information. This is the strongest kind of evidence of reasonable and probable cause, and it is uncontradicted. It is true that the plaintiff swears that the defendant gave instructions to Taylor and Carr, but he does not swear that the defendant in fact instructed them, or either of them, to ship the leaf silver which came from the Peterson Lake as Nova Scotia ore. The defendant's evidence is not very satisfactory, and on the first reading I was rather impressed with the view first taken by the trial Judge; but upon a more careful perusal I can find no evidence upon which a jury could fairly pronounce that the defendant had a guilty knowledge of the act charged, or that there was a lack of *bona fides* in what he did in laying the matter before his solicitor.

I think the trial Judge was right in withdrawing the case from the jury. This appeal should be dismissed with costs.

SUTHERLAND, J.:—I agree.

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MIDDLETON, J.:—The action of malicious prosecution is in English law anomalous and stands alone (unless indeed an action for defamation upon a privileged occasion can be said to be in the same category) in that malice is essential to the action: *Allen v. Flood*, [1898] A.C. 1. The "malice" necessary to the maintenance of the action is defined in *Abrath v. North Eastern R.W. Co.* (1886), 11 App. Cas. 247, and *Cox v. English Scottish and Australian Bank*, [1905] A.C. 168, as the initiation of the proceedings complained of from an indirect and improper motive, and not in furtherance of justice. The existence of malice is, according to English law, a question for the jury.

The plaintiff must also establish affirmatively that the defendant had not reasonable and probable cause in instituting the proceedings in question. *Lister v. Perryman* (1870), L.R. 4 H.L. 521, thus defines the functions of Judge and jury upon this branch of the case: "The jury must find the facts on which the question of reasonable and probable cause depends, but the Judge must then determine whether the facts found do constitute reasonable and probable cause."

Since *Ravenga v. Mackintosh*, 2 B. & C. 693, at any rate, it has been accepted law, to quote Bayley, J., that "if a party lays all the facts of his case fairly before counsel, and acts *bonâ fide* upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action:" *Martin v. Hutchinson* (1891), 21 O.R. 388; *Abrath v. North Eastern R.W. Co.*, *supra*; *Corea v. Peiris*, [1909] A.C. 549.

Is this a defence because it demonstrates an absence of malice or because it shews reasonable and probable cause? If the former, the case must go to the jury that they may pass upon the question of the defendant's good faith; if the latter, the questions must be determined in accordance with the rule above indicated.

There is not, so far as I am aware, any case in England or Canada in which this precise point has been determined.

In *Snow v. Allen* (1816), 1 Stark 502, Lord Ellenborough said: "How can it be contended here that the defendant acted maliciously . . . he was acting under what he thought was good advice; . . . unless you can shew that the defendant was actuated by some purposed malice, the plaintiff cannot recover."

In *Ravenga v. Mackintosh* the Court plainly dealt with the

defence as being one of reasonable cause, and upheld a verdict for the plaintiff, upon the ground that the jury had found that the defendant had not acted in good faith upon the opinion received.

In *Corea v. Peiris* the case came from Ceylon, and apparently, according to the local law, the whole matter was for the Judge. There it is said that "there is not sufficient proof that the respondent was actuated by malice or that there was not reasonable and probable cause."

In the *Abrath* case the matter is dealt with as a question of reasonable cause.

In none of these cases is the precise nature of the defence considered. The indication of opinion, if any can be fairly gathered, is in favour of the defence constituting probable cause.

In the United States, on the other hand, the question of the exact nature of the defence afforded by the advice of counsel has been frequently discussed and has given rise to great diversity of view. Professor Tiedeman, in an article found in 21 American Law Register, p. 582, collects and classifies most of the cases. He says: "It is remarkable with what uncertainty the books speak of the manner in which the advice of counsel constitutes a defence. Some of the cases hold that it is proof of probable cause. . . . Some maintain that it disproves malice, in most cases imposing no limitation upon its scope; . . . while others, and it is believed the majority of the cases, refer to it as establishing both the absence of malice and the presence of a probable cause;" and in other cases the advice of counsel is said to "negative the malice that might be inferred by the jury from the absence of reasonable cause."

Substantially the same remark is made in Mr. Stephen's book (published some six years later) at p. 43 (Bl. ed., 1889, Am. notes by Rumsey).

A still further view is that the advice does not constitute a defence at all, but is merely evidence to go to the jury in support of the defendant's case. See an article and collection of cases in 33 American Law Register, p. 591, at p. 596. The whole subject is also discussed in 18 L.R. A. N.S. (1909) p. 1. In none of these citations is the bearing of the nature of the defence upon the functions of Judge and jury discussed.

The conclusion that I arrive at, after perusing all the English and Canadian and very many of the American cases, is that the

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opinion of counsel honestly obtained after a full disclosure of the facts known to the defendant, and honestly acted upon, constitutes reasonable and probable cause for the prosecution, and is not merely evidence either of reasonable and probable cause or in answer to the charge of malice.

The advice of counsel based upon full knowledge of the facts is within the definition of reasonable cause given by Mr. Justice Hawkins in *Hicks v. Faulkner* (1878), 8 Q.B.D. 167:—

(1) An honest belief of the accuser in the guilt of the accused.

(2) Based on an honest conviction of the existence of the circumstances leading the accuser to that conclusion.

(3) Based on such grounds as would lead a fairly cautious man in the defendant's situation so to believe.

(4) The circumstances so believed affording reasonable ground for belief in the guilt of the accused.

As put by Campbell, J., in *Stanton v. Hart* (1873), 27 Mich. 539: "The law allows honest action upon the advice of counsel who have been fully informed on the facts, to be a complete justification, upon the sole ground that a person has done all he could be expected to do to enable him to act safely."

The same result is reached if we apply the test laid down by Tindal, C.J., in *Broad v. Ham* (1839), 5 Bing. N.C. 722: "In order to justify a defendant there must be a reasonable cause,—such as would operate on the mind of a discreet man: there must also be a probable cause,—such as would operate on the mind of a reasonable man; at all events such as would operate upon the mind of the party making the charge; otherwise there is no probable cause for him."

A discreet and reasonable man would place the facts before a competent counsel and would act upon his advice.

Had the matter been at large, I would have been inclined to regard the advice of counsel as constituting a defence because it conclusively negated malice in the institution of the prosecution. Malice in law is more than a "rejoicing in evil" and the possession of a "wicked mind," and involves either an intentional disregard of the legal rights of others or an equivalent recklessness: *English v. Lamb* (1900), 32 O.R. 73; *Manitoba Free Press Co. v. Nagy* (1907), 39 S.C.R. 340. Legal advice, even if erroneous, may well shew that the defendant was in good faith acting within what he

supposed to be his legal rights. This would seem to me to avoid making malicious prosecution an exception to the general rule; thus conduct which in itself is unreasonable does not become reasonable in the eye of the law merely because a solicitor or counsel is the one at fault: *In re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547, at p. 562. *Brewer v. Jacobs* (1884), 22 Fed. Repr. 217, is a forcible presentation of this view of the question.

The view which I accept is well presented by Mr. Justice Strong in *Stewart v. Sonneborn* (1878), 98 U.S. 187: "That the facts stated," *i.e.*, a full presentation of facts to counsel and *bonâ fide* action upon his opinion, "were a perfect defence to the action; that they constituted in law a probable cause, and being such, that malice alone, if there was such, was insufficient to entitle the plaintiff to recover, —is, in view of the decisions, beyond doubt. . . . If the defendants in such a case as this acted *bonâ fide* upon legal advice, their defence is perfect."

It is also of importance to note that the "malice" essential to the maintenance of the action is not a mere absence of good faith, but is defined, as already indicated, as the "initiation of the proceedings from an indirect and improper motive and not in furtherance of justice." *Bona fides* is as essential a part of reasonable and probable cause as *mala fides* is of malice, and in many places there is found confusion of thought, in that, as soon as good faith is discussed in dealing with reasonable cause; it is assumed that the Court is unconsciously drifting into the discussion of the topic of "malice," which is clearly not the case when the secondary and special meaning of this term is kept in mind.

What then is the duty of the trial Judge in a case where a legal gentleman of experience and standing is called and shews that he advised the proceedings in question, and that the facts were fully known to him at the time the advice was given, and the defendant shews that he acted in good faith upon the advice so given? Can the Judge withdraw the case from the jury, or must he ask the jury to find the facts? Our statute expressly provides that in an action of this kind no questions shall be submitted to the jury, so that the only way in which the matter can be dealt with, if the jury is to intervene, is that the Judge shall present his opinion upon the law to the jury, leaving to them to ascertain and apply the facts. This does not aid in solving the question, but makes its importance more apparent.

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Davis v. Hardy (1827), 6 B. & C. 225, determines the precise question unless it can be said to be inconsistent with the later cases. Upon the trial the defendant called a witness, and, his evidence shewing reasonable cause for the prosecution, the trial Judge, who had previously refused to nonsuit, withdrew the case from the jury and dismissed the action. Counsel for the plaintiff obtained a rule, and in support of it contended: "The facts sworn to by the witnesses on one side are not to be taken as proved against the other side. The jury are to decide whether they are proved or not. . . . The jury are to ascertain the facts . . . The Judge entirely withdrew the case from the consideration of the jury, and took upon himself to decide the fact, whereby the plaintiff's counsel was deprived of the opportunity of remarking on the demeanour of the witness and the consistency of his evidence." Abbott, C.J., says: "Where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a Judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly." Bayley, J., says: "If there is nothing in the demeanour of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon. If this case had been submitted to a jury, and they had disbelieved this witness, I think we should have been bound to send the case down to a new trial."

This, in effect, is the same principle as that laid down in *Ryder v. Wombwell* (1868), L.R. 4 Ex. 32, which has the sanction of the Privy Council in *Giblin v. McMullen* (1868), L.R. 2 P.C. 317, and *Hiddle v. National Fire and Marine Insurance Co. of New Zealand*, [1896] A.C. 372.

In *Lister v. Perryman* and *Abrath v. North Eastern R.W. Co.* the question is not discussed. In each case the facts were in dispute.

In *Brown v. Hawkes*, [1891] 2 Q.B. 718, the question is discussed in the Court of Appeal. Lord Esher says (p. 726): "The question whether there is an absence of reasonable and probable cause is for the Judge and not for the jury, and if the facts on which that depends are not in dispute, there is nothing for him to ask the jury, and he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order

to arrive at a conclusion on this point, those facts must be left specifically to the jury, and when they have been determined in that way the Judge must decide as to the absence of reasonable and probable cause."

This was accepted and acted on by the Supreme Court in *Archibald v. McLaren* (1892), 21 S.C.R. 588. The defendant had acted in instituting proceedings upon the statement of a woman, known to him to be of loose character. The trial Judge found that in what he did the defendant acted reasonably and honestly, and dismissed the action. The Divisional Court ordered a new trial, being of opinion that the belief of the defendant in the statement upon which he acted was a material fact which must be found by the jury before the Judge could nonsuit. The Court of Appeal divided equally upon this question, and an appeal was had to the Supreme Court, which allowed the appeal and restored the judgment of Armour, C.J. Strong, J., says: "The Judge is entitled, no doubt, to the utmost assistance from the jury in finding the facts, and he is entitled for this purpose to put questions to them in any form which his ingenuity may suggest, but he, and not the jury, is to make the deduction, and if he shifts the burden of doing so upon them the case is not properly tried . . . There were then no facts in dispute to leave to the jury, and the learned Judge could not have left any question material to be decided in the case to them without abdicating the functions which the law had delegated to himself." Gwynne, J., says: "It was for the learned Judge who tried the case to determine whether there was anything in the evidence or in the manner in which it was given which created a doubt in his mind as to the defendant's belief in the truth of the statement made to him by the woman Dale, or which cast a doubt in his mind as to the *bona fides* of the defendant in laying the charges. . . . It was upon the learned Judge, and, in the absence of contradictory evidence upon essential facts on which the question of existence or non-existence of probable cause depended, upon him alone, that the duty of determining whether the defendant had or had not reasonable and probable cause for making the charges which he did, rested."

The full significance of these statements is only felt after perusal of the unreported judgments in the Court below and the evidence (see bound cases, 103 S.C.) No case can be suggested in which the

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circumstances, though there was no contradictory evidence, invited comment more strongly than this, and, had the question been one for the jury, and had the jury found adversely to the defendant, the Court would probably not have interfered.

Hamilton v. Cousineau, 19 A.R. 203, was relied upon by counsel for the respondent, and, if it really determines anything in conflict with the opinions extracted above, must now be regarded as overruled.

Cox v. English Scottish and Australian Bank, [1905] A.C. 168, is the decision of the Privy Council upon an appeal from Queensland. At the trial the question of reasonable and probable cause had been left to the jury. Lord Davey, after pointing out this, says, "The Judge ought to have determined that for himself upon the facts found by the jury;" and, after saying that a new trial has been ordered, proceeds: "Care should be taken by the learned Judge who tries it to reserve for himself the duty of saying whether, on the facts given in evidence, there was reasonable or probable cause."

In *Still v. Hastings* (1907), 13 O.L.R. 322, 14 O.L.R. 638, as Anglin, J., says (13 O.L.R. at p. 325), the facts were "clearly in dispute, and were necessarily subject to the findings of a jury." The passage there quoted from *Hicks v. Faulkner*, 8 Q.B.D. 167, "The belief of the accuser in the guilt of the accused, his belief in the existence of the facts on which he acted, and the reasonableness of such last-mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the Judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause," cannot, in view of the opinions given in the later cases, be regarded as now correctly stating the law. It assigns too much to the jury and leaves too little to the Judge.

I have not overlooked the statement of Tenterden, C.J., in *Taylor v. Willans*, 2 B. & Ad. 845, at p. 857, that the jury is "to determine the facts, which include the motives of the parties."

For these reasons, the learned Chief Justice was only discharging his judicial function when, in the absence of any contradictory evidence, he found that there was reasonable and probable cause, and entered judgment for the defendant. I agree with this finding.

St. Denis v. Shoultz, 25 A.R. 131, *Watson v. Smith* (1899), 15

Times L.R. 473, *Malcolm v. Perth Mutual Fire Insurance Co.* (1898), 29 O.R. 406, *Fellowes v. Hutchison* (1855), 12 U.C.R. 633; *Kelly v. Midland Great Western R.W. Co.* (1872), Ir. R. 7 C.L. 8, *Searly v. Saxton* (1896), 28 N.S.R. 278, are all valuable and important decisions throwing some light on the question.

Since the above was written, the Divisional Court has determined the case of *Ford v. Canadian Express Co.* (1910), 21 O.L.R. 585, which is in accordance with the views above expressed.

Appeal dismissed with costs.

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[DIVISIONAL COURT.]

LOBB V. LOBB.

Will—Construction—Gift to “Children”—Illegitimate Children—Exclusion of Legitimate Children—Surrounding Circumstances.

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Held, affirming the judgment of MULOCK, C.J.Ex.D., 21 O.L.R. 262, upon the construction of the will in question, and having regard to the surrounding circumstances, that the expression “my children” could not be given its *primâ facie* meaning, but must be taken to refer to the testator’s illegitimate children only.

AN appeal by the plaintiffs from the judgment of MULOCK, C.J.Ex.D., 21 O.L.R. 262, dismissing without costs an action brought by the legitimate sons of Charles Lobb, deceased, against his illegitimate son, to enforce a claim for a share in the estate of the deceased, under his will, the provisions of which are set out in the report of the judgment appealed from.

September 22 and 23. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

H. H. Collier, K.C., for the plaintiffs. Upon the true construction of the will, the plaintiffs are included in the word “children” used by the testator. The expression “my children” is first used in the will with reference to the Church and James streets residences, and there is no subsequent expression which has the effect of cutting down the meaning so as to exclude the testator’s legitimate children from the benefits of the will. The general rule applicable to wills of this description, as stated by Lord Chelmsford in *Hill v. Crook*

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(1873), L.R. 6 H.L. 265, at p. 276, is that "a gift to 'children' *primâ facie* imports legitimate children," and that "this construction will not yield to mere conjecture, or to anything short of the clearest evidence of an opposite intention:" see also *Wilkinson v. Adam* (1812-13), 1 V. & B. 422, *per* Lord Eldon at p. 466; *Harris v. Lloyd* (1823), T. & R. 310; *In re Haseldine, Grange v. Sturdy* (1886), 31 Ch.D. 511, *per* Bowen, L.J., at p. 519. It may be conjectured that the testator meant his bounty to extend only to his illegitimate children; but, as stated by Lord Eldon in *Harris v. Lloyd*, it is one thing to have an intention, and another thing to carry it into effect. The following cases were also referred to: *Dorin v. Dorin* (1875), L.R. 7 H.L. 568, *per* Lord Selborne, at p. 577; *In re Horner, Eagleton v. Horner* (1887), 37 Ch.D. 695, 705; *In re Harrison, Harrison v. Higson*, [1894] 1 Ch. 561, 567. The general result of the authorities is that the word "children" must include legitimate children, unless, as Lord Selborne says in *Dorin v. Dorin*, cited by Stirling, J., in the *Horner* case, at p. 705, "some repugnancy or inconsistency (and not merely some violation of a moral obligation or a probable intention) would result" from such an interpretation. It is submitted that in the present case no such repugnancy or inconsistency exists, and it is not allowable to speculate as to what were the probable intentions of the testator.

E. D. Armour, K.C., for the defendant, was not called upon in answer, but was asked the following question by the Court: "Have you found any case in which natural children took under a will, to the exclusion of legitimate children?"

Armour. I have not found any such case.

The judgment of the Court was delivered orally by BORD, C.:—The case has been rightly decided in the Court below. The question is as to the testator's intention, and by this is meant such an intention as a reasonable man, placing himself, as has been said, "in the testator's chair," would suppose the testator had, having in view all the surrounding circumstances. In this case these are the long period, from 1853 to 1883, during which he had lived in complete isolation from his wife and family in England, the new ties he had formed in this country, the fact that his illegitimate children were under age at the date of the will, etc. Having regard to these facts, and the context of those passages in which the testator speaks of

"my children," it appears that the *primâ facie* meaning of that expression was controlled, so as to make it refer only to his illegitimate children.

The appeal should, therefore, be dismissed, but, in all the circumstances of the case, it is proper that costs throughout should be paid out of the estate.

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[IN CHAMBERS.]

ONTARIO LIME ASSOCIATION V. GRIMWOOD.

Mechanics' Liens—Lien of Material-man—Several Buildings—Entire Contract—Several Owners—Equities—Summary Application to Vacate Lien—Status of Applicant—Registry Act.

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Sept. 13.
Sept. 30.

Where one owner enters into an entire contract for the supply of material to be used in several buildings, the material-man can ask to have his lien, under the Mechanics' and Wage Earners' Lien Act, follow the form of the contract, and that it be for an entire sum upon all the buildings. If the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to shew the facts, and, if the facts cannot be ascertained, less violence will be done to the statute by construing it as indicated than by rendering it nugatory in many instances in which the Legislature apparently intended a lien to exist. And when, after the lien has attached to several distinct buildings, the owner has sold one or more, the equities which then arise between the owners of the several buildings may be worked out upon the principles applied where part of a property subject to a mortgage is sold and the mortgagee seeks to enforce his remedy against both parcels.

Where an action to enforce a lien for material supplied by the plaintiffs under one contract for several buildings was brought against several defendants having separate interests in the land sought to be charged, a summary application by the defendant G., who made the contract with the plaintiffs, and was also alleged to have an interest in the land, to vacate the registry of the lien, upon the ground that there could be no valid lien against several buildings, was dismissed; it being *held*, that it was not so clearly demonstrated that the lien was bad that it should be vacated upon a summary application by G., who was not in a position to invoke the benefit of the Registry Act.

Dunn v. McCallum (1907), 14 O.L.R. 249, distinguished.

Claiming a lien upon too much property will not invalidate it altogether.

MOTION by the defendant Grimwood, in an action to enforce a mechanics' lien, for an order vacating the registry of the plaintiffs' claim of lien and certificate of *lis pendens*.

September 14. The motion was heard by the Master in Chambers.

R. H. Greer, for the defendant Grimwood.

H. H. Shaver, for the plaintiffs.

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September 16. THE MASTER IN CHAMBERS:—The motion is based on the decision in *Dunn v. McCallum* (1907), 14 O.L.R. 249. Here, however, it appears that when the contract was made between the plaintiffs and the defendant Grimwood, he was the owner of the whole of the lots covered by the lien. It was not until a later date that he parted with his interest in some of the land without any notice to the plaintiffs.

The Act, in effect, puts a person entitled to a lien in the position of an incumbrancer. If what was done here could operate as a discharge, the Act would be seriously impaired, if not rendered useless. At least, such persons would in every case have to register a lien at the earliest moment allowed under sec. 22 of the Act, which would lead to useless expense and complication of titles.

It cannot be necessary to search the registry after the contract has been made or the work begun in order to preserve the rights of those entitled to the benefit of the Act.

The motion is dismissed, with costs (fixed at \$12) to the plaintiffs in any event.

The defendant Grimwood appealed from the Master's order.

September 27. The appeal was heard by MIDDLETON, J., in Chambers.

The same counsel appeared.

September 30. MIDDLETON, J.:—The material in this case is most unsatisfactory and leaves much in doubt. I give the facts as I gather them, leaving it open to the tribunal ultimately dealing with the matter to ascertain the truth, quite unfettered by this judgment.

James and George Bell owned the land. They made an agreement to sell the entire parcel, consisting of four adjoining lots, 9, 10, 11, and 12, to Baxter and Skipper. Baxter and Skipper agreed to sell the same lands to Grimwood. Grimwood erected a pair of houses on lot 9 and the north 11 ft. of lot 10. He then sold these houses to Baxter and Skipper. As the land had never been conveyed by the Bells, they then conveyed this parcel to Baxter and Skipper. None of these documents are produced, and the only date that can be ascertained is the date of the conveyance, which the registrar's abstract shews as the 7th April, 1910. This was

registered on the 12th April. The consideration is stated to be \$534. Grimwood is said to have received \$3,500 for the houses. The remaining land, lots 11, 12, and the southerly 8 feet 10 inches of lot 10, was leased by Grimwood to Slingsby for 99 years; the lease is dated the 25th March, 1910, and is registered on the 11th April, 1910. Slingsby on the same day mortgaged this land to Grimwood for \$13,200. The Bells do not appear to have yet conveyed these lands to any one.

The situation, when it ultimately comes to be dealt with, is complicated by mortgages made by Baxter and Skipper and by Grimwood to the defendants the Hastings Loan Company and the London Life Insurance Company. These are not now before me for consideration.

By the lease Slingsby agreed to erect four houses upon the parcel leased to him. Upon the argument it was said that Slingsby had surrendered this lease, but there is no evidence of that, and the mortgage to Grimwood—which is not produced—might prevent any such surrender becoming effectual.

It is said that these four houses are now built.

According to the registrar's abstract, 34 mechanics' liens have been registered against the four lots, and 8 certificates of *lis pendens*, based upon certain of these liens.

These liens are claimed upon the estate of the Bells, Grimwood, Baxter and Skipper, Slingsby, and the several mortgagees. One of these liens is that of the Ontario Lime Association, being that now in question. This purports to be based upon a contract with Grimwood for the sale to him of lime to be used in the erection of certain houses upon the four lots, the contract being made on the 1st April. The lien was registered on the 11th May, and the only thing said in the statement of claim as to the defendants other than Grimwood is that they "or some or one of them" own the lands. The lien itself claims against Grimwood's estate in the lands as well.

One Oliver Mowat Moore, an agent of the plaintiffs, swears that, "to the best of his knowledge and belief," the facts set out in the statement of claim are true.

Grimwood now moves to vacate the lien, basing his motion on an affidavit of his own, not contradicted save in so far as Moore's affidavit may be taken as a contradiction, in which he sets out that he has no interest in the four houses on the leased portion of the

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land save as landlord under the lease, and that the four houses on this part of the land were commenced by Slingsby. He has apparently forgotten his \$13,200 mortgage, if it is still in existence, and also fails to explain how he came to make several mortgages upon the land leased, unless these may be inferred to be mortgages of his reversion.

The point argued was that there could be no valid lien upon several buildings, and the lien must, therefore, be vacated.

Sections 6 and 8 of the Mechanics' Lien Act give a lien upon the estate or interest of the owner in the building and appurtenances and the land occupied thereby and enjoyed therewith.

The framers of the Act probably did not have present to their minds the case of an owner making a contract covering several distinct buildings. The applicant's attitude is that, the right to a lien being a statutory right, the statute must be strictly construed, and, unless the claimant can bring himself within the strict words of the Act, he is without remedy. He seeks to have applied to this Act the same process of reasoning as was adopted with reference to the Act making an equity of redemption exigible under execution, as indicated by *Wood v. Wood* (1869), 16 Gr. 471, *Donovan v. Bacon* (1869), 16 Gr. 472n., *Wood v. Hurl* (1880), 28 Gr. 146, *Bank of Commerce v. Rolston* (1902), 4 O.L.R. 106, and similar cases, which have rendered the statute of little practical use. There is no binding authority compelling me so to hold; *Dunn v. McCallum*, 14 O.L.R. 249, the only Ontario case having even a remote resemblance, being clearly distinguishable; and I prefer to adopt a mode of dealing with the question which will not defeat the spirit of the statute by a too literal adherence to its letter.

In *Dunn v. McCallum* a material-man supplied lumber to a contractor, who had on hand several contracts with different persons for the erection of quite distinct buildings. The lumber he bought went into these buildings; no one could say how much went into any particular building, nor was there any way by which the payments made by the contractor to the material-man generally upon account could be applied. Under these circumstances, the plaintiff failed because he could only have a lien upon the lands of the owner, with whom he had no contract, upon shewing that material for which he had not been paid had gone into that particular building. He could not call upon the separate owners of all

the buildings upon which the contractor worked, and cast upon them the onus of shewing how much material not paid for had gone into each house. He could only have a lien upon each owner's house for the amount due to him for material that had gone into that particular house, and the onus was upon him to make his claim upon each house severally, and the Act did not permit him to join all the houses and all the owners in one proceeding and make one lump claim against all jointly.

This differs materially from the case where one owner chooses to enter into an entire contract for the supply of material to be used upon several buildings. From the nature of the contract, the onus is here shifted, and the claimant can ask to have his lien follow the form of the contract, and that it be for an entire sum, upon all the buildings. If the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to shew the facts, which must be peculiarly within his own knowledge, and if, as often must be the case, the facts cannot be ascertained, less violence will be done to the statute by construing it as indicated than by rendering it nugatory in many instances in which the Legislature apparently intended a lien to exist.

Some aid is obtained from the provision of the Interpretation Act by which words used in the singular may be read as plural.

When, after the lien has attached to several distinct buildings, the owner has sold one or more, the equities which then arise between the owners of the several buildings may well be worked out upon the principles applied where part of a property subject to a mortgage is sold and the mortgagee seeks to enforce his remedy against both parcels.

Although this is the first case of the kind in this Province, the question has arisen in many of the United States Courts upon similar statutes—great care is necessary in dealing with these cases, as many turn upon particular provisions not found in our statute, and the result is by no means uniform.

In *Lewis v. Saylors* (1887), 73 Iowa 504, the Supreme Court of that State, following earlier decisions to the same effect, held that, where lumber had been furnished to an owner for two buildings, a mechanic's lien might be established against one of them, without shewing that the particular materials for which the suit is brought

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went into the particular building on which the lien is sought to be established. By this it was not meant that a lien could be established upon one building for materials which could be *shewn* to have gone into another, but only that, if the defendant desired to relieve one building from the joint lien, the onus was upon him.

In *Livingston v. Miller* (1863), 16 Abbott's P.R. 371, the Supreme Court of New York held that a mechanic's lien for materials furnished for the erection of several houses, supplied for a sum in gross, attached to all the buildings, and that the lien-holder was entitled to be paid out of any or all of the houses.

The question has been before the Courts of Massachusetts in several cases, and the decisions are uniform. In *Wall v. Robinson* (1874), 115 Mass. 429, a number of buildings were upon one parcel of land, consisting of several lots. Morton, J., upheld the lien upon the entire parcel, saying: "The statutes are designed to give to the mechanic who by his labour and skill enhances the value of an estate the security of a lien upon the estate to the extent he has added to its value. They provide that any person to whom a debt is due for labour performed or furnished in the erection, alteration or repair of any building or structure, by virtue of an agreement with, or by consent of, the owner, shall have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which the same is situated. In the case at bar the petitioners have performed labour upon several buildings situated upon the same lot under an entire contract for an entire price. We think such a case is within the purpose of the statute and the intention of the Legislature. The parties by their contract have connected the several buildings and treated them as one estate. Under the contract the labour performed upon each building creates a lien upon the whole lot and therefore upon all the other buildings."

In the later case of *Childs v. Anderson* (1880), 128 Mass. 108, the Court refused to extend the law so as to cover a case similar to *Dunn v. McCallum*, for reasons similar to those accepted by our own Court. In numerous other cases semi-detached houses and houses erected in a row have been treated as one building.

On the material before me, I cannot say that the applicant has so clearly demonstrated that the lien is bad as to enable me to say that it should be vacated upon a summary application. Were it certain

that none of the material supplied had been used in the four houses on the leased portion of the land, then the lien would be bad as to these houses, but would remain upon the two erected upon the remaining land. Claiming a lien upon too much property will not invalidate it altogether.

The motion is made by Grimwood, who is not in a position to invoke the protection of the Registry Act. This statute may be found to be an important factor when the rights of the other parties come to be considered.

While I dismiss this motion, the argument has probably contributed something toward the adjustment of the rights of the parties, so I make the costs here and below in the cause—a course which meets the approval of the learned Master.

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[IN CHAMBERS.]

PETTIGREW V. GRAND TRUNK R.W. Co.

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Oct. 3.

Parties—Third Parties—Indemnity or Relief over—Cause of Action against Defendants—Grounds not Applicable to Claim against Third Parties—Trial of Issues—Order for.

A defendant does not lose the right to have his claim against a third party determined in the action against him because the plaintiff, in addition to claiming upon grounds as to which there is, or may be, a right of indemnity, also alleges other grounds with which the third party has no concern.

The rights of the parties are not to be finally determined on the interlocutory motion for directions except in the plainest cases, and it is enough that the plaintiff has made a claim against the defendant in respect of which there is a *prima facie* claim to relief over.

And where the plaintiff sued a railway company for damages for the death of her husband from an injury received from a train upon a siding in the yard of a lumber company, and alleged obstruction of the spaces on each side of the siding as one of several causes of the injury, and the railway company claimed indemnity or relief over from the lumber company, as third parties, by reason of the agreement of the latter to keep these spaces free from obstruction, an order of the Master in Chambers giving directions for the trial of the issues between the railway company and the lumber company, was affirmed.

APPEAL by the Knechtel Lumber Company, third parties, from an order of the Master in Chambers giving directions for the trial of issues between the defendants and the third parties.

September 30. The appeal was heard by MIDDLETON, J., in Chambers.

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R.W. Co.*G. H. Kilmer, K.C., for the appellants.**D. L. McCarthy, K.C., for the defendants.**S. G. Crowell, for the plaintiff.*

October 3. MIDDLETON, J.:—The plaintiff, a widow, sues the railway company for damages, under Lord Campbell's Act, for the death of her husband.

The accident took place upon a siding running from the main line to the yards of the Knechtel Lumber Company, the third parties, while a train was backing into the siding to connect with a car standing there. The deceased, the plaintiff says, for the purpose of making the coupling, descended from the train, and, because lumber had been piled close to the track, was compelled to walk along the track itself, and was knocked down and killed by the train. It is said that, in addition to the lumber being so piled, snow and ice had accumulated, and this sloped down to the track, making it impossible to use such small space as there was between the lumber and the rails. In addition to these two matters, it was charged as negligence that the frog at this point was packed, and that the deceased in walking along the track caught his foot in it. The coupling lever is said to have been defective, but it is not shewn how this contributed to the accident. The plaintiff also alleges that the train was not in charge of a skilled person, and was run recklessly and at too high a speed under the circumstances.

The foundation for the claim over against the lumber company is an agreement of the 16th March, 1903, under which the siding in question was constructed. Under this agreement the railway company constructed the siding, and the lumber company pay interest at six per cent. on the cost, and also pay the cost of maintenance and repair. The lumber company agree to keep the siding free from snow, ice, and obstruction, and also agree to keep a space six feet wide on each side of the siding free from all obstructions.

Upon the plaintiff's case it may be found that the accident was caused by the failure of the lumber company to observe their contract and keep the siding free from snow and ice and to keep the space of six feet free from obstruction. On the other hand, the plaintiff may be entitled to recover against the railway company in respect of matters quite apart from those indicated.

In my view, the defendants do not lose their right to have their

claim against the third parties determined in this action because the plaintiff, in addition to basing her claim to recover upon grounds as to which there is, or may be, a right of indemnity, also alleges that she can recover upon other grounds with which the third parties have no concern.

The rights of the parties are not to be finally determined on the interlocutory motion for directions, except in the plainest cases, and it is enough that the plaintiff has made a claim against the defendants in respect of which there is a *prima facie* right to relief over.

It is premature to enter upon the discussion, suggested by the third parties, as to what the plaintiff's position may be, if all that can be found in her favour is the obstruction in question—it may be that unless she can establish some other negligence she will fail—and it also may well be that, if any other negligence is shewn, the defendants will fail in their claim for relief over. These are matters for the trial, and under our present system the facts should be first found and then the law applied. Unless the third party procedure can be made use of in a case like this, it has very largely failed in its object. The third parties are manifestly interested in the questions to be determined between the plaintiff and the defendants, and ought to be heard at the trial, so as to see that this question is duly tried, and that the ground of liability is definitely ascertained. There ought only to be one trial of the question of the defendants' liability, and at that the facts ought to be so ascertained that the question between the defendants and third parties will be in train for adjustment. This can be accomplished by questions being submitted to the jury.

In the result, the appeal is dismissed with costs to be paid by the third parties to the plaintiff and defendants in any event.

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[MIDDLETON, J.]

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RE FOSTER AND TOWNSHIP OF RALEIGH.

Oct. 6.

Municipal Corporations—Powers of Licensing and Regulating—Billiard Tables—By-law—Jurisdiction of Council—Motives Influencing Action—License Fee—Prohibitive Amount—Imposition for Revenue Purposes—Provincial Legislature—Powers of—B.N.A. Act, sec. 92 (9)—Delegation of Powers.

Where a township council passed a by-law, under sec. 583, sub-secs. 4 and 5, of the Consolidated Municipal Act, 1903, for licensing and regulating the keeping of billiard tables for hire, and fixing the annual license fee at \$100 per table:—

Held, that, nothing fraudulent or malicious being shewn or charged against the members of the council, the Court would not quash the by-law upon the allegation that it was passed for the purpose of putting the applicant out of business; the council having dealt honestly with a matter within its jurisdiction, the Court should not inquire into the motives or reasons which influenced its action.

Held, also, that the license fee was not so large as to be in its nature prohibitive.

Held, also, that a municipality may impose a license fee with a view to revenue. By the British North America Act, sec. 92 (9), power is given to the Province to make laws in relation to such licenses in order to the raising of a revenue for Provincial, local, or municipal purposes; and when the Province delegated to the municipality the power to make laws regarding "licensing," and also the express power to fix a license fee, without any restriction or limitation, it must be taken to have handed over to the municipality the full power conferred by sec. 92 (9).

Pigeon v. Recorder's Court and City of Montreal (1890), 17 S.C.R. 495, 501, 502, followed.

MOTION by Charles Foster to quash a by-law passed by the council of the township, under sec. 583, sub-secs. 4 and 5,* of the Consolidated Municipal Act, 1903, for licensing and regulating the keeping of billiard tables for hire and fixing a license fee.

September 28. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

J. M. Ferguson, for the applicant.

J. G. Kerr, for the township corporation.

The points argued are stated in the judgment. The following authorities were referred to by counsel: *In re Talbot and City of Peterborough* (1906), 12 O.L.R. 358; *Rex v. Laforge* (1906), *ib.* 308; *Rowland v. Town of Collingwood* (1908), 16 O.L.R. 272;

*583. By-laws may be passed by the councils of the municipalities . . .

4. For licensing, regulating and governing all persons who for hire or gain, directly or indirectly keep, or have in their possession, or on their premises any billiard or bagatelle table, or who keep or have a billiard or bagatelle table in a house or place of public entertainment or resort, whether such billiard or bagatelle table is used or not, and for determining the time during which such licenses shall be in force. . . .

5. For fixing the sums to be paid for licenses required under by-laws passed under the preceding clause 4.

Cooley on Taxation, pp. 1138, 1139, 1142; Dillon on Municipal Corporations, 4th ed., p. 424; *Pigeon v. Recorder's Court and City of Montreal* (1890), 17 S.C.R. 495; *Re Karry and City of Chatham* (1909-10), 20 O.L.R. 178, 21 O.L.R. 566; Biggar's Municipal Manual, pp. 341, 734; *In re Neilly and Town of Owen Sound* (1875), 37 U.C.R. 289.

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October 6. MIDDLETON, J.:—The attack upon the by-law, as developed upon the argument, may be thus stated:—

(1) The by-law was not a fair and proper exercise of municipal legislative powers, but was in truth aimed at the applicant, and was passed for the purpose of putting him out of business.

(2) The tax, \$100 per table, is so large as to amount to prohibition. The applicant has three tables, and his net income, without deducting the license fee, is under \$400 per annum.

(3) The license fee is more than is necessary to cover the expenses incident to the granting of the license and inspecting the premises, and is clearly fixed for the purpose of creating a municipal revenue. This is plain from the fact that the fee is so much per table; it cannot cost three times as much to license and inspect premises with three tables as premises with one table only.

All these grounds were fully and carefully argued by both counsel.

In my view, the Courts cannot too carefully refrain from entering into matters that by law are made the subject of municipal control. When it is made to appear that the municipal council is acting fraudulently or maliciously, and has in fact abdicated its real function, and is exercising its powers for the attainment of private ends or the gratification of private revenge, then the Court may well interfere; but with respect to all matters delegated to the municipality the council is supreme, and the Court has no power to supervise or criticise. With regard particularly to all questions which arise regarding matters which have or are supposed to have some relation to morals or social questions, nothing could be more dangerous than any attempt to enter upon the motives and reasons which have actuated the legislative body. The members of the council must answer to the electors and the electors alone. The annual election enables speedy redress to be had when any "representative" ceases to represent the true views of the community at large.

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Nothing more is really shewn or charged against the members of this council than that they have heard those in favour of free billiards and those in favour of high taxation; and they have considered and dealt honestly with a matter entirely within their jurisdiction. See *City of Montreal v. Beauvais* (1909), 42 S.C.R. 211, at p. 216.

Then is the tax "prohibitive"? The Legislature has not given the power to prohibit, and the subordinate municipal council, while quite free and unfettered and supreme within the ambit of its delegated jurisdiction, undoubtedly must not transcend these delegated powers and successfully grasp a power not delegated. It cannot, under the cloak of regulation, prohibit, and do indirectly that which it cannot do directly. The tax is not so large as to be in its very nature prohibitive, and the fact that the applicant, in the conduct of his business in the ramshackle shed now proudly designated "Billiard Hall," though till recently only known as a barn, cannot make any adequate profit, is quite beside the mark: *Re Pang Sing and City of Chatham* (1909-10), 1 O.W.N. 238, 1003. I cannot, upon the material, find that this by-law is in its nature prohibitive, even though the result may be that no one may undertake to establish a billiard room in the township. There may be no reasonable demand for such a place, and the fact that, even in the absence of any license or regulation, until recently there was no such resort, indicates that this is the case. On the other hand, a higher fee may compel any billiard hall which is to survive to secure something like adequate accommodation.

Little guidance can be had from the cases: \$200 has been held to be a prohibitive fee for a cigarette license: *In re Talbot and City of Peterborough*, 12 O.L.R. 358; and \$2,500 for a liquor license: *Rowland v. Town of Collingwood*, 16 O.L.R. 272; while \$300 for a billiard license was regarded as not being excessive: *In re Neilly and Town of Owen Sound*, 37 U.C.R. 289. Much that is said in that case by Hagarty, C.J., applies with force here.

There then remains the third ground of attack. The fee is a "revenue charge." Is it competent to a municipality to impose a license fee with a view to revenue? I have not been referred to any Ontario case upon the question, and have found none in which it is discussed.

There is, no doubt, a large volume of American law shewing

that a legislative grant to a municipality of the power to license and regulate does not necessarily include a power to exact a license fee for revenue purposes, the delegated authority being merely the conferring of a police jurisdiction for the securing of order and good government in the local municipality. I have been able to reach a conclusion which does not necessitate a review of these cases. I have read those cited on the argument, and very many others, and proceed to consider our own municipal law in the light of these authorities.

By the British North America Act, sec. 92 (9), power is given to the Province to make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes."

When the Province delegated to the municipality the power to make laws regarding "licensing," and also the express power to fix a license fee, without any restriction or limitation, it must be taken to have handed over to the municipality the full power conferred by the section quoted—the right to exact a license fee for raising a revenue for municipal purposes. The whole scheme of the Municipal Act is the delegation to the local municipalities—within the prescribed limits—of the full and plenary jurisdiction possessed by the Legislature itself.

When it has been deemed wise to limit the amount to be charged as a license fee, this limitation has been expressly made. When no limit, the discretion of the council is the only guide, subject to the qualification above indicated, that the fee must be honestly imposed as a license fee, and not with the view of prohibiting.

There is a dictum of Strong, J., in *Pigeon v. Recorder's Court and City of Montreal*, 17 S.C.R. 495, at p. 503, which goes further: "When the power of taxing is conferred it never can be objected to an instance of its exercise that the tax imposed is prohibitory in its operation; in all such cases the amount of the tax must rest exclusively in the discretion of the body possessing the power to impose it." This is *obiter* only, because in the case then under discussion there was power to prohibit. This case, however, is clear authority in favour of the municipality upon this application, and I quote what is said at pp. 501-2 as conclusive authority: "The argument . . . is that . . . the statute is to be interpreted as conferring powers of police regulations only and

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not taxing powers; that the sum to be fixed by the by-law as that to be paid for the license is not intended as a tax or impost for revenue purposes, but merely as an indemnity for the expense and trouble of issuing the license; . . . There is no force whatever in this argument. Had the city council only possessed the police power (and it would have been restricted to that if the mere power to regulate, and for that end to license, had been conferred without any express provision authorising the exaction of a sum to be paid for the license) there might have been some colour for this contention; but when we find the Legislature authorising the city council to impose such charge for the license as it should think reasonable, without any reference to the payment being by way of indemnity, as a fee for the trouble and expense involved in issuing a license, an interpretation which would restrict the words in which the statute is expressed in the way contended for would be nothing short of legislation and is therefore entirely inadmissible. . . . It would be impossible for any Court, without arrogating to itself the power of revising and controlling the acts of the council, a jurisdiction for which no authority can be derived from statute or common law, to say that the fee to be paid must be limited in amount to a sum which should appear to the Court to be reasonable as a mere remuneration for the labour and expense of issuing the license."

In the result, the motion fails on all grounds and must be dismissed with costs.

[DIVISIONAL COURT.]

RE SOLICITOR.

D. C.
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 Oct. 6.

Solicitor—Retention of Client's Money—Promise to Pay "Retainer"—Order for Delivery of Bill of Costs—Motives Inducing Litigation.

A promise to pay a "retainer"—that is, a preliminary fee given to secure the services of the solicitor and induce him to act for the client—is void; and a solicitor obtaining money for his client is not entitled to retain thereout an amount agreed in writing to be paid to him by his client as a retainer. When a matter is brought before the Court, the Court can consider only the legal rights of the parties, not their reasons for asking for their rights. Order of MIDDLETON, J., 21 O.L.R. 255, affirmed.

AN appeal by the solicitor from the order of MIDDLETON, J., 21 O.L.R. 255, directing an attachment to issue against the solicitor,

unless he should, within two weeks, deliver a bill of costs or a statement in writing that he made no claim against the client for costs and disbursements. The facts are stated in the judgment of MIDDLETON, J., as reported.

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October 3. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

E. Meek, K.C., for the solicitor. The client in this case was a woman of mature age and experience, and made the agreement to pay the retainer to the solicitor with full knowledge of all material facts in relation thereto. There was nothing illegal about the agreement, and the learned Judge from whose order this appeal is taken erred in his statement of the abstract principle involved. [RIDDELL, J.:—Any person else can make such an agreement, but not a solicitor. I wish the law were different.] I refer to *In re Whitcombe* (1844), 8 Beav. 140, which is cited in *Cordery on Solicitors*, 3rd ed., p. 261, as stating the law before the English Solicitors' Act, 1870. [RIDDELL, J., referred to *In re Newman* (1861), 30 Beav. 196, as being also cited in *Cordery*.] The only difference between such an agreement with a layman, and with a solicitor, is that in the latter case the agreement will be scrutinised with special care, as the solicitor is an officer of the Court. In this case the solicitor accepted and acted upon the agreement and paid money on the strength of it, and it is valid until set aside: *Stedman v. Collett* (1854), 17 Beav. 608, 614. If the Court should hold that there ought to be a taxation of the solicitor's bill, there should be a special reference for the purpose, as the original order should not have been obtained on *præcipe*.

R. McKay, for the applicant, relied upon the authorities cited in the judgment of Middleton, J., and referred particularly to *Re Solicitor* (1907), 14 O.L.R. 464.

October 6. The judgment of the Court was delivered by RIDDELL, J.:—Whatever the form, the substance of this application is to have a declaration that a solicitor obtaining money for his client is entitled to retain thereout an amount promised him—agreed in writing to be paid to him—by his client, as a “retainer.”

The word “retainer,” like most others in our language, has

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more than one meaning: *e.g.*, it may mean the act of employing a solicitor or counsel, or it may mean the document by which such employment is evidenced; but in the present instance its meaning is a preliminary fee given to secure the services of the solicitor and induce him to act for the client. It is needless to cite authorities or quote dictionaries to establish this as the meaning—this is well recognised in the profession.

A client may give his solicitor or counsel a preliminary fee in this sense—if so, it is a present—it does not at all diminish the fees properly chargeable and taxable against the client, and does not appear in the bill. It is not expected and it needs not to appear in any account—it is not taken into account at all in determining the amount at any time payable to the solicitor or barrister or by him, and has no influence or effect in the financial relations between client and legal adviser.

A promise to pay a retainer is not enforceable—and, if the professional man is content to take a promise to pay a “retainer,” instead of insisting upon payment in cash, he must rely upon the honour and generosity of his client—a promise to pay a retainer is void.

No case has been cited to us and I can find none which can cast doubt upon these propositions; and I do not think it necessary to cite any cases in addition to those cited below.

We have nothing to do with the reasons influencing the client to take these proceedings. When a matter is brought before the Court, the Court can consider only the legal rights of the parties, not their reasons for asking for their rights: *Attorney-General v. Sheffield Gas Consumers Co.* (1853), 3 D. M. & G. 304, 311; *Township of Bucke v. New Liskeard Light Heat and Power Co.* (1909), 1 O.W.N. 123, 124, 14 O.W.R. 841, 844.

The appeal should be dismissed with costs.

[MIDDLETON, J.]

COLVILLE V. SMALL.

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Oct. 7.

Champerty—Action by Assignee of Claim—Agreement to Divide Fruits—Invalidity—R.S.O. 1897, ch. 327, secs. 1, 2—Illegality—Public Policy—Dismissal of Action—Con. Rules 259, 616.

The plaintiff sued for a money claim absolutely assigned to him by a document which authorised him to sue and recover, and, out of the proceeds, first to pay costs, and then to divide what remained equally between the assignors and assignee. In retaining a solicitor to prosecute the action the plaintiff pledged his own credit, and had no right of indemnity against the assignors:—

Held, a champertous assignment; and champerty is not obsolete, but is defined, forbidden, and the agreement is made invalid, by R.S.O. 1897, ch. 327, secs. 1 and 2.

When the action is brought by the assignee, in his own name, and the assignment is shewn to be champertous, the Court treats it as "invalid" and void for all purposes; and, the illegality appearing, refuses, upon grounds of public policy, its aid to the plaintiff whose title is tainted by illegality.

Power v. Phelan (1884), 4 Dorion (Quebec) 57, approved.

And the action was dismissed upon an issue of law determined under Con. Rule 259 and a motion for judgment under Con. Rule 616.

MOTION by the defendant for a summary order determining whether the assignment to the plaintiff of the contract upon which he sued was champertous. The facts appear in the report of a previous motion, *ante* 1, and in the judgment below.

September 30. The motion was heard by MIDDLETON, J., in Chambers, but was treated as a Court motion.

J. L. Counsell, for the defendant.

W. M. McClemon, for the plaintiff.

October 7. MIDDLETON, J.:—This action is brought by an assignee of the contract sued on. A motion was made before me in Chambers for the summary determination of the question whether the assignment in question is champertous. Upon the matter being discussed, both parties expressed themselves as anxious that this question should be disposed of before the hearing, and it was ultimately agreed that the pleadings should be amended so as to raise the question, and that the point of law should be argued by consent under Con. Rule 259, and that the motion should then be heard as though concurrently a motion was made to stay the action or dismiss it under Con. Rule 616, on the admissions made by the plaintiff in his examination for discovery, or for the same relief upon the same material by an appeal to the inherent jurisdiction of the Court.

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The plaintiff's case, as stated in his examination and in an affidavit made explanatory of certain answers, is that his solicitor recommended him to the assignors as a collector who would take in charge the collection of the claim, and also asked him if he would do so. Thereafter the claim was assigned to him by a document which authorises the assignee to sue and recover, and, out of the proceeds, first to pay costs, and then to divide what remained equally between the assignors and assignee.

The plaintiff says that in retaining his solicitor to prosecute this action he pledged his own credit to him, and has no right of indemnity against the assignors.

This is champerty of the plainest possible description.

Champerty is said to be the "maintenance of a suit, in consideration of some bargain, to have part of the thing in dispute or some profit out of it." "The worst of all maintenances; an offence and actionable at common law:" 2 Inst. 208.

Our own Legislature, R.S.O. 1897, ch. 327, sec. 1, adopting the language of an earlier statute, enacts: "Champer-tors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains." "All champertous agreements are forbidden, and invalid:" *ib.*, sec. 2. The fact that the provision was re-enacted (with the addition of the 2nd clause) in 1901, is a sufficient answer to the suggestion, made upon the argument, that champerty is almost obsolete.

The vigorous language of Lord Clare in *Kenney v. Browne* (1796), 3 Ridg. P.C. 462, at p. 498 *et seq.*, is applicable to the present time, and his sentiments have found an echo in the recent decision of our own Chancellor in *Re Solicitor* (1907), 14 O.L.R. 464. Lord Clare says: "It is a crime at common law to maintain a suit, in which the man maintaining is not interested, and the peculiar species of maintenance of which the appellant has been guilty is called champerty,—that is, maintaining a suit in consideration of having some part of the thing in dispute. . . . This most mischievous practice is further restrained by . . . several statutes. . . . These statutes, very much to the injury of society, have fallen . . . much into disuse . . . In my judgment, their disuse has been essentially injurious to society, and I should wish to see some public examples of men prosecuted to justice for breach of these

most salutary laws. But although the letter has not been executed, the spirit of them has been uniformly enforced by Courts of Equity."

See also *Carr v. Tannahill* (1870), 30 U.C.R. 217, and cases there collected.

I should, however, rest content, as *did* Grove, J., in *Ball v. Warwick* (1881), 50 L.J.Q.B. 382, with the statement: "It is not for me to express any opinion as to whether it is desirable to keep up the offence of champerty; it suffices that the law still exists."

The second matter argued was more difficult. Does the fact that the assignment is champertous afford any answer to the plaintiff's claim? The assignment is absolute and vests the right of action in the plaintiff, and he alone can sue. Is the existence of a champertous agreement between the plaintiff and his assignors any reason why the defendant should not be compelled to pay his debt? Is it not entirely *res inter alios acta*—a matter of no concern to the defendant? So the plaintiff presents his case, and, no doubt, many American decisions go to support his contention. "The weight of authority, however, supports the rule that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defence thereto, and can only be set up between the parties when the champertous agreement itself is sought to be enforced:" 6 Cyc. 881. This is the law of England and Ontario only when the action is brought by the person in whom the cause of action is originally vested. When the action is brought by an assignee, in his own name, and the assignment is shewn to be champertous, then the Court treats it as "invalid," to use the word of the statute, and void for all purposes; and, the illegality appearing, the Court refuses, upon grounds of public policy, its aid to the plaintiff whose title is tainted by illegality: *Prosser v. Edmonds* (1835), 1 Y. & C. Ex. 481; *Little v. Hawkins* (1872), 19 Gr. 267; *Hilton v. Woods* (1867), L.R. 4 Eq. 432.

The precise point is clearly stated by Dorion, C.J., in *Power v. Phelan* (1884), 4 Dorion (Quebec) 57: "A contract founded on an unlawful consideration has no effect, and a consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order. . . . Such a contract gives no right of action not only as between the parties themselves, but also no right of action to recover from third parties the claims assigned." This was said of a champertous assignment of the claim sued upon.

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In this way the case is determined quite apart from the doctrine with which the question here arising is somewhat coupled in some of the earlier cases, that at common law, as well as in equity, a mere right to sue was not regarded as being capable of assignment; now, by statute, a cause of action arising out of contract can be freely assigned: see cases collected upon an earlier application in this case, *ante* 1; but this still leaves open for consideration all questions arising upon the illegality of the transaction.

This result is in accordance with the general law relating to illegality. See *Scott v. Brown*, [1892] 2 Q.B. 724; *Clark v. Hagar* (1894), 22 S.C.R. 510; *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214; *Brown v. Moore* (1902), 32 S.C.R. 93; *Continental Wall Paper Co. v. Louis Voight and Sons Co.* (1909), 212 U.S. 227.

In the result, the legal objection taken by the defendant is well founded, and the action must be dismissed with costs.

This order will issue as a Court order, after the pleadings are actually amended.

[MIDDLETON, J.]

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MANUFACTURERS LUMBER CO. v. PIGEON.

Oct. 8.

Receiver—Equitable Execution—Fund not Presently Payable—Money Earned but Pledged for Performance of Contract—Form of Order—Creditors' Relief Act, sec. 25—"Just or Convenient"—Judicature Act, sec. 58, sub-sec. 9.

Money had been earned by a contractor with a city corporation for the construction of pavements, in the sense that the construction work was completed, but under the terms of the contract the contractor was bound, without further remuneration than the original contract-price, to maintain the works in perfect repair for a specified time. In default of his making repairs in compliance with notice and demand, the corporation might repair and charge the cost to the contractor, and resort to a percentage of the contract-price to be held by the corporation during the term for which the contractor was bound to maintain:—

Held, that this fund, though not *debitum in presenti* and so not attachable, could be reached by a judgment creditor of the contractor by means of a receivership order; the position was that the money had been earned and had been pledged by the contractor, by a contract collateral to the construction contract, as security for the performance of that contract, to maintain and repair the work.

An order was made for the appointment of a receiver to receive the fund or any part thereof when it should become payable by the corporation; the order to conform to the requirements of the Creditors' Relief Act; 9 Edw. VII. ch. 48, sec. 25 (O.); and the costs to be dealt with as there provided. Circumstances in which an order for a receiver by way of equitable execution will be made, and the nature and effect of the order, pointed out.

Meaning and effect of the words "just or convenient" in the Judicature Act, sec. 58, sub-sec. 9.

AN appeal by the plaintiffs (judgment creditors) from an order of the Local Judge at Stratford dismissing a motion by the appellants for an order appointing a receiver by way of equitable execution.

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September 28. The appeal was heard by MIDDLETON, J., in the Weekly Court at Toronto.

W. G. Owens, for the plaintiffs.

R. S. Robertson, for the defendant.

October 8. MIDDLETON, J.:—The fund sought to be made available by the judgment creditor is \$1,360, now held by the City of Stratford under the terms of a contract for the construction of paving. The money has been earned in the sense that the construction work is entirely completed, but under the terms of the contract the contractor is bound, without further remuneration than the original contract-price, to maintain the works in perfect repair for a specified time. In default of his making repairs in compliance with notice and demand, the city may itself repair and charge the cost to the contractor, and may resort to a percentage of the contract price which is to be held by the city during the term for which the contractor is bound to maintain.

It is admitted that this sum is not a *debitum in presenti* which can be reached by the ordinary process of attachment. Garnishee process contemplates a sum certain which can be ordered to be paid either presently or at a future date. The amount to be paid in this case must remain uncertain until it is ascertained what sum, if any, the city may be entitled to deduct from it under the terms of the contract.

An execution creditor is entitled to the appointment of a receiver to aid him in reaching assets which are in their nature exigible to answer his claim, but which, for some reason, cannot be reached by the ordinary mode of execution, *i.e.*, under a *fi. fa.* or by garnishee process. "Equitable execution," as the appointment of such a receiver is commonly called, is not a process by which assets which are not in their nature exigible are made available; it is a process by which equity aids and is ancillary to the ordinary legal remedy; its original purpose is to obviate and remove difficulties in the way of legal process, but when equity

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(as incarnate in the old Court of Chancery) once put her hand to the plough she did not draw back, but carried the task to its completion, and distributed the fund rendered available.

After the fusion of the Courts, the idea seemed to spring up in many quarters that this familiar proceeding in equity might be used to make available to creditors property of their debtors of a kind that the Legislature had not thought fit to make liable to execution. These experiments have uniformly resulted in failure. The sanguine creditor, who has thought that it ought always to seem "just or convenient"* that his debt should be paid, has learned that the true meaning of this phrase, upon which he builded so much, is not to confer any new power upon the Court, but only to indicate that the old well-known jurisdiction might be exercised, as it always was, when justice and convenience so demanded: *Harris v. Beauchamp*, [1894] 1 Q.B. 801; *O'Donnell v. Faulkner* (1901), 1 O.L.R. 21.

The following are instances of failure: attempts to reach future earnings, *Holmes v. Millage*, [1893] 1 Q.B. 551; a claim by the debtor for salary accruing due, *Central Bank of Canada v. Ellis* (1893), 20 A.R. 364; entrance moneys at a theatre box office, *Cadogan v. Lyric Theatre Limited*, [1894] 3 Ch. 338; money to be paid by the Crown as a pure bounty, *Stewart v. Jones* (1901), 1 O.L.R. 34; money payable by executors in their discretion, *Re McInnes v. McGaw* (1898), 30 O.R. 38; an insurance policy not yet paid up, *Weekes v. Frawley* (1893), 23 O.R. 235 (*secus* as to a paid-up policy, *Canadian Mutual Loan and Investment Co. v. Nisbet* (1900), 31 O.R. 562); earnings of a patent of invention, *Edwards v. Picard*, [1909] 2 K.B. 903.

The case most nearly approaching this is *In re Johnson*, [1898] 2 I.R. 551, where it was held that money earned under an entire contract not yet completely performed could not be reached by receivership. I quite agree. The fact that the bulk of the work is done, and that what remains to be done is only an insignificant part of the whole, makes no difference. Though in one sense the greater portion of the money has been earned, as a matter of law none is earned until all the work is done.

This case comes very close to the line, and it is hard to say with certainty upon which side it falls. I have come to the con-

* Judicature Act, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 9.

clusion that the money is earned and has been pledged by the contractor as security for the performance of his contract to maintain and repair the work. This, it seems to me, is a contract collateral to the construction contract, and the price to be paid is the price of construction only, and not of construction and maintenance. The maintenance is by way of warranty of the quality of the work, and is to be done *gratis* for the period named. This is aided by the provisions allowing the bond of a surety company to be substituted and the money to be drawn, also by the provision as to interest.

The defendant's counsel also represented the city, and, though the city clearly has no *locus standi* upon this motion, I allowed him to state fully all he desired to urge. He pointed out that the result of granting the order would be to cause the contractor to lose interest in the work, and he might not maintain and repair the road if the result would only be to free a fund for his creditors. Apart from the fact that I cannot assume a desire on the defendant's part to defeat his creditors, this falls far short of what was meant by the Chancellor when he refused to "sterilize the fund" in *Stewart v. Jones*, *supra*. The municipality is in no worse position than if the defendant assigned the fund, as he undoubtedly can.

The effect of the receivership order is not to affect or change in any way the rights of third parties, but merely to substitute for the debtor the hand of the receiver, who as an officer of the Court may assert the debtor's rights in the debtor's name, and apply the proceeds in payment of his debt. While in one sense it is an "execution," the rights of the parties may be more clearly apprehended if the receiver is regarded as the debtor's attorney by judicial appointment or as an assignee, by compulsion, of the chose in action: *McGuin v. Fretts* (1887), 13 O.R. 699; *Stuart v. Grough* (1887), 14 O.R. 255; *Mones v. McCallum* (1897), 17 P.R. 356, 398; *Flegg v. Prentis*, [1892] 2 Ch. 428.

The order will, therefore, go for the appointment of a receiver to demand and receive the fund in question or any part thereof as and when the same may become payable by the City of Stratford. The order must be so framed as to conform to the require-

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ments of the Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 25 (O.)*; and the costs of the application here and below will be dealt with as there provided.

*25. Where a judgment creditor obtains the appointment of a receiver by way of equitable execution of property of his debtor, the receiver shall pay into Court the money received by him by virtue of his receivership, and the same shall be subject to the provisions of the next preceding section, but the creditor shall be entitled to be paid thereout the costs of and incidental to the receivership order and the proceedings thereon in priority to the claims of all other creditors.

24. Where there is in any Court a fund belonging to an execution debtor or to which he is entitled the same or a sufficient part thereof to meet the executions in the sheriff's hands, may, on the application of the sheriff or any person interested, be paid over to the sheriff, and the same shall be deemed to be money levied under execution within the meaning of this Act.

[BOYD, C.]

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FITCHET V. WALTON.

Oct. 8.

Malicious Arrest—Civil Process—Order for Arrest—Misleading Judge by Affidavit—Suppression of Facts—Absence of Reasonable and Probable Cause—Malice—Intention to Leave Province—Evidence—Statements Made to Judge not in Affidavit—Damages—Discharge of Judgment.

In order to succeed in an action for wrongful and malicious arrest under civil process, the plaintiff must allege and prove that the defendant obtained the order for arrest by some deception practised on the Judge; that he either stated or suggested something that was untrue, or omitted to state something within his knowledge that was material and which would or might have caused the Judge to refuse to grant the order; and also that in applying for the order the defendant acted maliciously, and made the affidavit for the arrest without reasonable and probable cause.

Coffey v. Scane (1894-5), 25 O.R. 22, 22 A.R. 269, followed.

The application for the order must be based on sworn, written, evidence contained in the affidavit; and that cannot be eked out by some oral explanation or supplemental information given by the applicant to the Judge upon the *ex parte* application for the order. And, *semble*, oral evidence of statements so made to the Judge would not be admissible upon the trial of the action for wrongful arrest.

The real test is, on the evidence, what was the knowledge possessed by or the information communicated to the creditor at the time he made the affidavit? And that is to be investigated having regard only to what is set forth in the affidavit; the scope of what the creditor knew at that time is the matter to be considered in judging of the reasonable and probable cause for his action.

And where the facts and circumstances in evidence were inconsistent with reasonable and probable cause for making an affidavit that the plaintiff was forthwith about to leave the Province with intent to defraud the plaintiff, and the affidavit produced a false effect by suppression, and was intended to be used for the intimidation of the plaintiff so as to coerce him into making a settlement, which was sufficient evidence of malice, the plaintiff was held entitled to succeed in his action for wrongful arrest.

Damages assessed at \$500, and judgment against the plaintiff (in the action in which the arrest was made) discharged.

THIS was an action to recover damages for the wrongful and malicious arrest of the plaintiff, who alleged that the defendant, by misleading the Judge of the County Court of the County of York, by an affidavit made by the defendant for that purpose, in an action in that Court in which the defendant in this action was plaintiff and the plaintiff in this action was defendant, obtained an order for the plaintiff's arrest from that Judge, and the plaintiff was arrested and imprisoned thereunder, but was ultimately discharged by an order of that Judge, upon his own application in that action.

The following statements in the affidavit were complained of by the plaintiff as false or misleading:—

"I have good reason to believe, have probable cause, and do verily believe, that the said William Fitchet intends to leave the Province of Ontario with intent to defraud his creditors generally and myself, a creditor, in particular."

"He" (meaning the plaintiff) "has sold all his season's crop and produce, and, to the best of my knowledge, has not used any considerable part of the proceeds to pay his debts."

"He has disposed of his farm stock and implements."

"He has been in negotiation with one A. A. Conover for employment and also the purchase of land from said Conover in Manitoba, as alleged to me by the said Conover."

"The wife of the said Fitchet has admitted to me personally the stated intention of the said Fitchet to leave the said Province forthwith."

"One John Nigh, of the township of Whitechurch, did drive the said Fitchet to the railway station within one week past to take train out of the Province, and that failure to make some arrangements detained him on that occasion."

"I believe I am justly and truly entitled to obtain a writ of arrest for the said William Fitchet under chapter 80, R.S.O. 1897, acting for myself and on behalf of other creditors of said Fitchet."

The action was first tried on the 16th October, 1909, before BRITTON, J., and a jury, when a finding for the plaintiff with \$1,500 damages was made by the jury, and judgment entered thereon by the Judge with costs.

This judgment was set aside by a Divisional Court, upon the defendant's application, on the 4th March, 1910, and a new trial ordered; costs of the first trial and of the application to be cost in the cause.

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September 29 and 30. The second trial was begun before BOYD, C., with a jury, at Toronto, but by consent of the parties the jury was dispensed with before the evidence was closed.

John W. McCullough and *James McCullough*, for the plaintiff.
W. E. Raney, K.C., and *T. H. Lennox*, K.C., for the defendant.

October 8. BOYD, C.:—Full consideration is given in *Coffey v. Scane* (1894-5), 25 O.R. 22, and 22 A.R. 269, to the requirements needful to succeed in an action for wrongful arrest on the civil side. MacLennan, J.A., said in 22 A.R. at p. 274: "In order to succeed the plaintiff must allege and prove that the defendant obtained the order by some deception practised on the Judge; that he either stated or suggested something that was untrue, or omitted to state something within his knowledge that was material and which would or might have caused the Judge to refuse to grant the order; and also that in applying for the order the defendant acted maliciously and without any reasonable and probable cause for so doing." This last condition, as explained by Osler, J.A., at p. 272, is that it should be made to appear that there was a want of reasonable and probable cause for making the affidavit for the arrest. In the Court below, Armour, C.J., says: "The burden lay upon the plaintiff of shewing that the Judge was imposed upon; and, in the absence of the Judge's evidence, we could only hold that he was imposed upon, upon its being shewn that there was some false statement in the affidavit of a material fact which, if truly stated, or some suppression of a material fact which, if stated, would undoubtedly have prevented his granting the order for arrest." *Coffey v. Scane*, 25 O.R. at p. 34.

It is laid down by Street, J., speaking for a Divisional Court in *Scane v. Coffey* (1892), 15 P.R. 112, at p. 119 that in making an *ex parte* application it is the duty of the applicant to take pains to set out fully and fairly the true facts of the case; and that the plaintiff who procures such an arrest is only to be protected from an action for wrongful arrest when he is shewn to have been entirely frank and open in his application for the order and to have had reasonable grounds for the statements he has laid before the Judge (p. 121). This observation is peculiarly pertinent to the case of interference with personal liberty upon a summary application in which the highest coercive power of the Court is invoked.

I quote again from the language of Mr. Justice Osler, in *Beam v. Beatty* (1901), 2 O.L.R. 362, at p. 363: "The expected departure from Ontario must be with intent to defraud. . . . The statute requires it, . . . and the Judge may infer it from the facts and circumstances shewn by the affidavits, just as any other relevant fact may be inferred from those positively deposed to." This shews, what indeed the statute enacts, that the application must be based on sworn, written, evidence contained in the affidavit. In this case it was sought to eke out or modify a part of the affidavit by some oral explanation or some supplemental information given by the applicant, who himself drew the affidavit and appeared in person before the Judge. This kind of evidence was not given or tendered on the former trial, and I took it with much hesitation and scruple. The Judge himself was not called, and it is not desirable that he should be called, nor could his testimony on this point be, in my opinion, properly admissible. In the face of what the defendant swore on the former trial, "that he told the Judge only what was in the affidavit," I do not think I can take into account the alleged oral and unsworn additions. But, even if admitted, they would not overcome the many serious difficulties that arise in being able to regard the affidavit as other than unfair and misleading.

The real test is, on the evidence, what was the knowledge possessed by or the information communicated to the creditor at the time he made the affidavit? That is to be investigated having regard to what is set forth in the four corners of the affidavit for arrest: he is to be taken as having relied only on what he chooses to set forth therein, and the scope of what he knew at that time is the matter to be considered in judging of the reasonable and probable cause for his action: *Shaw v. McKenzie* (1881), 6 S.C.R. 181.

If the affidavit on which the arrest proceeded were to be revised according to the facts known to the creditor Walton at the time he swore to it, on the 22nd March (Monday), it would read in this way:—

(a) "Fitchet in the fall of 1908 sold all his season's crop and produce, and, to the best of my knowledge, has not used any considerable part of the proceeds to pay his debts."

[It is proved to my satisfaction that the crop was sold for about \$500, and all was expended to pay debts, except about \$40.]

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(b) "He has disposed of his farm stock and implements at a sale by public auction on the 27th January, 1908, and all proceeds were applied to satisfy the claims of his landlord, Lloyd, and a chattel mortgagee, Widdifield."

(c) "He was talking of going west with one Conover, and wanted to know if he would go with him, and talked of taking up land there; Conover arranged to hire Fitchet's son, aged 13, at \$25 a month, and the father wanted \$30, and Conover offered \$25, but would not promise him steady work, as he (Conover) told me on the 16th or 17th March, 1909."

(d) "Fitchet's wife told me on the 13th March, when coming to try to settle Fitchet's claim on his landlord, Lloyd, for whom I was acting, that her husband was going west."

[This is denied by the wife.]

(e) "On the 16th March Fitchet and his wife and son came to the station, and the father helped to load stuff on a car for Conover, which was going west, and he wanted to go on the car with his son, but Conover refused to let them go, and Conover spoke to me about it and said he was willing to take the son, but the father had a very sore hand, and he hesitated to take him, as he did not know if he could get on with him, and at the end of that week Conover went off to the west without Fitchet."

As nearly as I can make out, this is precisely the substance of what Conover told Walton and what Walton knew before he went to Toronto in the following week and made the affidavit as it now stands.

There is much contradiction about the actual facts, but these are as Conover told them to Walton about his dealing with Fitchet.

The Fitchets say, and I am inclined to think the real version of occurrences was, that the boy was willing to go west with Conover, and his parents were willing to send him, and went to the station for that purpose, but, as they could get no satisfactory written assurance that he would be cared for and looked after by Conover, they changed their minds, and the negotiations thus ended by their all staying at home, while Conover went off alone. That he did go off alone was known to Walton.

The real explanation of the arrest is, in my opinion, referable to the trouble which existed in order to get a settlement between the tenant Fitchet and his landlord Lloyd (over eighty years of

age), for whom Walton acted as banker and special agent in this matter of settlement. Walton held three promissory notes, one for \$75 made by Fitchet and Lloyd, and two for \$64.50 and \$18 made by Fitchet and wife and Lloyd. Lloyd had agreed with Fitchet for the sale of the rented farm on three months' notice and to pay for the fall ploughing and sowing. The sale was made without the three months' notice, but it was arranged that Fitchet would leave, notwithstanding, on getting \$200 for work done on the place, and also (as Fitchet says) the delivery up of the three notes, but (as Lloyd says) on the delivery up of the largest note. Fitchet says he was willing, when misunderstanding arose as to the three notes, to agree to pay the \$18 note, but that was refused, and the parties split on the terms on the 8th day of March.

Fitchet had arranged to leave the place, and had rented a house for a year at Temperanceville, and had paid three months' rent in advance. Walton knew of this renting, and had asked Fitchet to rent one of the houses which he had available. But, when the settlement failed, he stayed on the farm rented, and did remain there till June, 1910, when he moved off after a law-suit with Lloyd. Mrs. Fitchet saw Walton (sent by Lloyd) on the 13th March, and offered to take \$175 cash and the notes, but Walton refused. Lloyd was anxious to be able to give possession of the farm, and this condition of affairs suggested the possibility of a settlement all round by laying hold of the plaintiff under process of the Court. There was money enough in Walton's hands for Lloyd to pay all these notes; and a view of all the facts and circumstances leads me to the conclusion that they are quite inconsistent with reasonable and probable cause for making an affidavit that the man was forthwith about to leave the Province with intent to defraud the plaintiff. The affidavit as it stands produces a false effect by suppression, and was intended to be used for the intimidation of the plaintiff so as to coerce him into making a settlement. These elements afford sufficient evidence of "malice" as legally used to justify the action. Fitchet was in gaol seventeen days before his discharge on affidavits.

At the last trial the jury gave \$1,500 damages: this is too much, but I think justice will be served by a verdict for \$500 and a discharge of the judgment recovered on the three notes with the costs of that action in favour of the plaintiff.

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The plaintiff should get all his costs of this litigation.

Cox v. English Scottish and Australian Bank, [1905] A.C. 168, 171, and *Hétu v. Dixville Butter and Cheese Association* (1908), 40 S.C.R. 128, may be usefully referred to.

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Trespass—Boundary Line between Lots—Agreement—Evidence—Statute of Limitations—Possession—Sufficiency to Maintain Action—Ownership Subject to Mortgage—Judicature Act, sec. 58 (4)—Proof of True Line—Survey—Method Adopted—R.S.O. 1897, ch. 181 secs. 14, 15, 17, 23, 24, 36—Astronomical Observations—Costs

The plaintiff owned, subject to a mortgage, lot 33 in the 3rd concession of the township of Alfred, and the defendant lot 34, immediately to the west thereof. Most of the line between these lots was well ascertained, but there was a dispute concerning about six rods at the south; and this action was brought to determine the boundary at that place:—

Held, that, although part of the line between the two lots had been agreed upon or fixed by the Statute of Limitations, that had no effect in or towards establishing a line in continuation thereof.

It was contended that the defendant had been for more than ten years in possession of the strip of land claimed by the plaintiff, and so had acquired title by the Statute of Limitations:—

Held, upon the evidence, that there was no exclusive possession: the plaintiff was the rightful owner of his own lot and the defendant of his, and each was in constructive possession up to the true line, wherever that might be.

Rogers v. Nixon, unreported decision of a Divisional Court, Queen's Bench Division, 21st December, 1889, followed.

The defendant also contended that the plaintiff had not such possession as enabled him to sue in trespass:—

Held, that, where one has the paper title to a piece of land and comes upon it and occupies in fact part thereof, he is considered in law in possession of the whole, unless another is in actual physical occupation of some part to the exclusion of the true owner; here no other person was in actual possession; and the plaintiff had sufficient possession.

Street v. Crooks (1856), 6 C.P. 124, distinguished.

Held, also, that the fact that the plaintiff was merely a mortgagor was rendered immaterial by the Ontario Judicature Act, sec. 58 (4).

McMullen v. Free, unreported decision of a Divisional Court, Chancery Division, 8th January, 1887, followed.

It was also contended by the defendant that the plaintiff had not made out the true line. The original survey of the township was made in 1797. In 1880 H. was appointed by the Lieutenant-Governor to make a survey of the east boundary line of North Plantaganet and the west boundary line of Alfred, from the Ottawa river to the front of the 11th concession. H., in making the survey, placed a stone monument at the north-west corner of the 3rd concession of Alfred, at the place at which an old post had previously been, and another stone monument at the south-west corner of the 3rd concession, and the line between these became the true western boundary of the township, and the governing line: R.S.O. 1897, ch. 181, secs. 14, 15, 17, 23, 24, 36. The road at the south-east corner was rightly placed so that

the monument was in the middle of the road. A survey was made for the plaintiff by W., who found these two posts, but, not having heard of H.'s survey, thought the monument at the north was at the true position for the east side of the road, thirty-three feet east of the west boundary of Alfred. The result was that the line which W. found made an angle with the true line of about 1' 43". Then he took a post on the north-east corner of lot 34, admitted to be at the place of the original post, and ran from this a line parallel to the line he had determined from H.'s monuments, thus running the line thirty-three feet east of the true line at the south end of the lot, and taking off certain of the plaintiff's land and putting it on the defendant's lot, of which the plaintiff did not and the defendant could not complain:—

Held, that the boundary was determined by the line run by W. A Court is not concerned with the question whether the surveyor took the prescribed means for determining his data—he should follow the directions of the statute; the Court is concerned with the facts, and not with the manner of determining the facts. The monuments planted by H. were found by W.; and it was a matter of indifference what method he adopted to satisfy himself that they were real monuments.

Held, also, that there is no necessity for finding the true astronomical bearing of the governing line, so long as the line to be run is on the same astronomical course.

Held, also, that the plaintiff was entitled to the costs of the action, although the damages assessed against the defendant did not exceed the amount paid into Court by him, the defendant not having admitted the plaintiff's title, which was the main matter in dispute, and there being nothing in the conduct of the plaintiff which should deprive him of costs.

Judgment of the Junior Judge of the County Court of the United Counties of Prescott and Russell affirmed.

THIS was an appeal by the defendant from the judgment of the Junior Judge of the County Court of the United Counties of Prescott and Russell in favour of the plaintiff, in an action in that Court for trespass to a certain piece of land, alleged by the plaintiff to form part of lot 33 in the 3rd concession of the township of Alfred, and for an injunction to restrain further trespasses thereon. The action was brought to determine the boundary between lot 33 and lot 34, which was owned by the defendant and lay to the west of lot 33.

The trial Judge gave reasons for his decision as follows:—

There is a road crossing the two lots near the south ends diagonally from the south-east to the north-west called the Treadwell road, and the claim is limited to the part lying south of that road. North of that road there is a fence between the two lots, which has been in existence, part of it for fifty or sixty years, and all of it for twenty-five or thirty years, so that it has become established as the line between the lots. The greater part of the fence extends in a straight line towards the south from the north head-line, but at the southerly end, towards the Treadwell road, it is not straight but makes a curve towards the east. The southern part is the oldest portion of the fence, and it is admitted that it

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has become established by the Statute of Limitations as the line between the lots. South of the Treadwell road there is a fence starting about opposite the fence on the north side of the road, but curving westward to about that general line, and extending about half-way to the south head-line. This fence has all been in existence for more than ten years, and the northern part of it, next the Treadwell road, much longer. The land on the west side of this fence, so far as it extends, has been cleared and occupied by the defendant for over ten years as part of the same clearing on lot 34, which is there cleared for some distance south or back from the Treadwell road; but on the east side of it lot 33 was all in bush when the plaintiff bought lot 33, about six years ago, though he has cleared it since. From the south end of this, south to the south head-line, was all in bush on both lots, and there was no fence along the south head-line along either lot. So far as this fence goes, the defendant has undoubtedly acquired a title to the land on the west of it and to have that fence remain as the line by length of possession, and it was practically admitted by the plaintiff's counsel that it was so. Through the bush south of this fence there was no fence, and, as admitted by the defendant, no line traced and no post at the south end and no mention of a line ever having been run. Through the bush the defendant contended that the line would be formed by a line which would form a production or continuation of the straight part of the fence north of the Treadwell road; while the plaintiff contends that it is a line which he had had run by a surveyor, Mr. Wilkie, in June, 1909, some distance to the westward, and it is the land lying between these two lines that is in question. The defendant admits having cut and taken away a quantity of wood and trees from part of this land in or about March, 1909.

The south quarter of the east half of lot 34 has belonged to the defendant since 1868, and the north three-quarters of that east half since 1870. Lot 33 belonged to his brother, Daniel McCusker, since 1871, when he got a deed of it from his father, until he sold it to the plaintiff in 1903; and the plaintiff's title to the lot was admitted.

The defendant pleaded that the line between the two lots was mutually settled and agreed upon between him and his brother more than ten years ago, and the fence constructed on that line to within a few rods of the south head-line; that, when the plaintiff bought, he knew of the said line fence, and was made aware of this

agreement, and bought with reference to the same; and also that, a couple of years after he bought, he and the defendant together ran out and continued the said line to the south head-line, and mutually agreed upon it as the dividing line.

The evidence given by the defendant himself, however, does not bear this out, at least as to the land south of the Treadwell road. He said that when he bought the south quarter of the east half of lot 34 there was a good fence running south from the Treadwell road for about three-quarters of an acre, with a brush fence extending further south, and that he extended the clearing and the fence further south about forty years ago, and kept the brush fence in repair for a number of years, and finally replaced it with a wire fence over ten years ago, but that he could not say that his brother had any knowledge of his extending the fence; that, as his brother's land was all in bush, he did not consider that he had to make any fence, and so did not say anything to him about it; that his brother never made any objection; and that he never heard a word about a line from him. Also, on cross-examination, he said: "My brother Dan never did any fencing on the line south of the Treadwell road. I never asked him. Any agreement I had with him applied to the north part of the road. Nothing about part to the south."

Then as to the plaintiff accepting the line, the defendant said that he and the plaintiff, in the spring after he came on the place, agreed on the division of the fence; that he shewed him how he and his brother Dan had had it divided; but that no mention was made at that time as to the fence south of the road; that the plaintiff's land there was all in bush, with no fence around it.

Some time afterwards, apparently in the autumn of 1905, the plaintiff and defendant themselves, as the result of talk about where the line was south of the Treadwell road, ran a line, in continuation of the straight part of the fence north of the road, out through the bush all the way to the south head-line, which cut off part of the defendant's cleared land on both sides of the road where the fence curved to the east; but it is plain that there was then no acceptance of this line and agreement to be bound by it on the part of the plaintiff. The defendant says that at that time he told the plaintiff that he himself was satisfied with the line, and to straighten the fence, if he (the plaintiff) was, and that, if he was not, he could get any one else or a surveyor, and that he said he

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thought he would get a surveyor; that afterwards, when the plaintiff had cut up to this line on the east, he asked him if he should cut up to it on his side, and that he told him he would rather he would not. The parties in the meantime had met, at the office of a conveyancer in the village of Alfred, about getting a surveyor, but could not agree upon each paying half the cost, as the plaintiff wanted. In fact, the defendant himself said, on cross-examination: "I wouldn't think there was an agreement between Charbonneau and myself when we run the line—I told him he could get a surveyor if he liked."

Neither, in my opinion, can anything that took place afterwards bind the plaintiff to go by that line. During the following winter he cut all the wood of his lot south of the Treadwell road up to that line, and then seeded it down in grass, and put up a fence along the head-line, placing a solid post at the termination of the line they had run, as if for what they call an "anchor-post" for the end of a fence, and from this post strung a couple of wires along the trees northwards to the south end of the defendant's fence. All this he did without any communication with the defendant.

Then, about December, 1908, about a year before the trial, the defendant says he saw the plaintiff and asked him what he was going to do about the line, and that he said he did not know; that he (the defendant) then said that it was doubtful if a Court would make a jog in the line for those two acres, but, if it did, he himself would claim up to his fences (shewing that up till that time there was no agreement settling the line); that the plaintiff asked him if he would go by the line (apparently both in the bush and in the cleared land) and that he said he would; that the plaintiff then said to him, "Put up the pickets;" and that he, "being a little cranky, perhaps," said, "You can put them up—I have put them up once;" and so they separated. But this is a long way from being a binding agreement to accept the line, I think.

Then followed the defendant's cutting the wood, the plaintiff's getting the surveyor to run the line and forbidding the defendant to remove the wood, which he did, and the commencement of the action.

The plaintiff may have been hesitating and partly inclined to accept the line; and it is a pity that the defendant was not a little more diplomatic; if he had been, he might, perhaps, have avoided

all the trouble; but, even if the plaintiff was then expressing willingness to accept the line—and it seems to me that there was not any agreement then—there was nothing to prevent him from changing his mind. Though it is stated as the law in *Bernard v. Gibson* (1874), 21 Gr. 195, that an agreement to settle upon a line between properties is not within the Statute of Frauds so as to require a writing, yet it is stated by Strong, V.-C., at p. 203, that he could not find any case where a parol agreement had been held conclusive without the adjunct of long-continued possession sufficient to give a title, or such standing-by and acquiescence in the acts of the other party as would constitute an equitable estoppel. See also *Ferrier v. Moodie* (1855), 12 U.C.R. 379, at p. 382, stating that the defendant in that case could not rely upon the agreement alone, if there was one established to run a line between the parties, and that such a line were designated more than twenty years before, without also shewing some visible occupation of the land. The fact that the plaintiff cut the timber by that line, coupled with his statement that he intended to bring on a surveyor to run the line, and strung the wires along the trees in an evidently temporary fashion, certainly was not a relinquishment of the land to the defendant, and could not be held to bind him to go by that line.

It seems to me, therefore, that the defences, as pleaded, fail.

At the trial the defendant's counsel contended that the fact of the defendant and his brother having the fence so long on a certain line, that is, the straight part of it, shewed an implied agreement that the direction of it should form the line throughout, and gave the right to have the line of the straight fence protracted through to the other end of the concession as the boundary between the properties.

That the having a fence on an agreed line part of the way, however, does not give the right to have that extended all the way, as the line, seems to me to have always been consistently held by the Courts from the earliest to the most recent times.

[The learned Judge referred to and quoted from *Doe dem. Hill v. Gander* (1844), 1 U.C.R. 3, at p. 4; *Doe dem. Beckett v. Nightingale* (1849), 5 U.C.R. 518, at p. 522; *Bell v. Howard* (1857), 6 C.P. 292, at p. 295; *Shepherdson v. McCullough* (1882), 46 U.C.R. 573; *Steers v. Shaw* (1882), 1 O.R. 26, at p. 32.]

It is true that there are many cases, such as *Shepherdson v.*

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McCullough and Steers v. Shaw, where the line formed by the protraction of a fence has been held to constitute the boundary line, but there was always a line run, put, or marked out, and observed and acted upon by each party exercising acts of ownership according to it; and it was this observing of the line that was decisive, and not the line claimed being the continuation of the fence. See the cases all reviewed in *Huffman v. Rush* (1904), 7 O.L.R. 346, which seems somewhat of a reaction, as in that case there was a line run through and distinctly marked, and yet it was not allowed to prevail, because both lots were in bush and not cleared or occupied.

[Reference to *Forrest v. Turnbull* (1909), 14 O.W.R. 478.]

In the present case there was no agreement, in fact nothing said at all, between the defendant and his brother, about the line through the bush, no line run or blazed or marked, and no exclusive occupation, by either party cutting according to a certain line. The defendant in his evidence said that, when the plaintiff asked him where the line was south of the road, he told him he did not know, but it would not be hard to continue the straight fence north of the road. The defendant also, in his examination for discovery, said: "I would suppose, the time the fence was put there, that the line may be was visible. The line might have been found then—that is, sixty years ago." Q. "You never saw any blazes on the south side of the road, did you?" A. "I could not say I did." Q. "What took place between you and the plaintiff about this line at the south end?" A. "About three or four years ago the plaintiff came to my house and asked me if I knew where the line was there, between 34 and 33. I told him just back where there was no fence. I could not tell him that I didn't know if there was a post or any mark. He asked me about a post, and I told him, 'I don't remember ever seeing a post.' "

This state of things is very different from any case where the line of a fence produced has been held to form a boundary. In *Bernard v. Gibson*, 21 Gr. 195, where the fence was built at both ends, with a gap in the middle, the line of the fences was held to be the boundary, not at all on account of the existence of the fences, but because "there had been a sufficient occupation of the lands on either side of the line for such a length of time as bound the parties under the Statute of Limitations."

The defendant's counsel also argued that the defendant had

been in possession for over ten years, under such cases as *Davis v. Henderson* (1869), 29 U.C.R. 344, and *Harris v. Mudie* (1882), 7 A.R. 414. But the evidence quoted above shews plainly that there was no exclusive possession; those cases would apply as much to the case of the plaintiff as of the defendant; each was the rightful owner of his lot, and each was in constructive possession up to the true line of his lot, wherever that might be.

He also argued that the plaintiff, by keeping off the land in question, not cutting on it, and making the fence, had refrained from taking possession, and so has not such possession as would enable him to bring trespass. But it seems to me that this is governed by the same principles as above. His not going on the land was not a relinquishment of the land, and could not affect his constructive possession of all the land that belonged to his lot.

The objection that because he had given a mortgage, and so had not the legal estate, and could not sue for trespass, as there was no redemise clause in the mortgage, though there was an attornment clause, seems to be exactly covered by sec. 58, sub-sec. 4, of the Judicature Act.

It seems to me, therefore, that all of these which may be called dilatory defences fail, and that the question of the boundary line between the lots through the bush is entirely at large between the parties on the merits, and that each can claim the land according to the true line, wherever that may be.

The question is, therefore, whether the plaintiff has shewn that the line he has surveyed is the true line, or whether the land on which he alleges the trespass was committed belonged to his lot.

The defendant gave no evidence whatever as to where the true line was, contending that the line of the fence had become established. He put the plaintiff to the proof of the line, and was relying on the weakness of such proof, as, of course, he had a perfect right to do.

A certified copy from the Crown Lands Department of the field-notes of the original survey of the first three concessions of Alfred, by William Fortune, in 1797, was put in, shewing that the survey was made by running a line from east to west across the township to form the front of the 3rd concession, laying off thirty-seven lots and certain roads, and planting posts between them, then running south the width of a road and of the concession to

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form the western boundary, and then running east across the township, again planting posts between each lot. This, however, did not make it a double-fronted concession, to have the side-lines run from each end, as that mode of surveying was not adopted till 1820: see *McGregor v. McMichael* (1877), 41 U.C.R. 128. The concessions number from the Ottawa river on the north, so that the front of the concession was towards the north: sec. 30 of the Surveys Act. The lots are numbered from the east, but the eastern boundary cuts across the lots diagonally, so that there are thirty-seven lots on the front of the 3rd concession, but only thirty-three on the rear, while the western boundary crosses the concession lines at right angles, and the lots are laid out parallel to it, so that it is plain that the eastern boundary was not intended to be the governing line for the courses of the side-lines between lots, but the western was: secs. 22 and 24 of the Act.

The line between these lots 33 and 34 will be the line commencing at the line between them at the front or north end and running on the same astronomical course as the straight line joining the front and rear ends of the western boundary line of the concession.

The surveyor Wilkie found a post at the north end of the fence between the lots which he took to be an undisputed post and to form the true commencement of the line. That it is so, I think, is shewn by the fact that the defendant at the trial did not dispute it, and in his examination for discovery, which was put in, said as follows: Q. "Did you ever see a post at the north-east corner of 34, a surveyor's post?" A. "Yes, I think there is a post there still." Q. "An old post?" A. "If it isn't the original post, it is one that was put about the same place. I know there was a post there for a long time. That post has never been disputed." Q. "And it is really not in dispute?" A. "No." Wilkie was not told this by the defendant, but that, I think, does not matter, when it is the fact. He judged that this post was undisputed, and was the correct point of commencement, from its position and appearance. He verified it, he says, by finding similar posts to the west between lots 35 and 36 and to the east between 31 and 32, and measuring the distance between them, when he found that the middle point between them was within half a link of the post. He did not swear the chain-bearer, and says it is not customary, as he held one end of it himself. He then went up to the western boundary, and

found there a travelled road between the townships of Alfred and North Plantagenet. He found a stone which he recognised as a surveyor's monument, placed in the middle of this road, where it would be intersected by the middle line of the concession road on the south of the 3rd concession. At the north end he found that the road made a jog, the width of itself, to the east, and then proceeded towards the north along the west side of the 2nd concession, and in this angle, on the opposite side from Alfred, he found another similar stone in line with the east side of the boundary road to the west of the 3rd concession. He was informed by some neighbours that these stones had been placed over twenty years before by a surveyor named Hamilton who had done some surveying on the boundary, but he did not put these men on oath as to what they said. He then took a point half a chain or 33 feet to the westward of the stone, in the angle of the road, and ran a line between this and the first-mentioned stone, in effect, a line up through the middle of the boundary road; then from the north end of this line he ran a line as a base line to the eastward, at an angle of $90^{\circ} 44'$, till he came opposite the post between the lots, then turned back towards the south or right the same angle of $90^{\circ} 44'$, and ran a line on that course out to the south head-line. This line diverges towards the west from the fence and reaches the south head-line at a point one chain and eighty-one links to the west of the line forming the continuation of the straight part of the fence, which was alleged by the defendant to be the true line.

If the work was done correctly, this line so run by Mr. Wilkie as the boundary between the lots must be parallel to the middle line of the boundary road, as the base-line cuts them, making the exterior angle equal to the interior and opposite angle (Euclid, prop. 28, book I.); so that, if the said line through the middle of the boundary road is the true boundary, this line will be the true line between the lots, assuming that parallel lines will be on the same astronomical course.

During the trial it was learned by the plaintiff's counsel that Hamilton's work on the boundary was official, and had been done by appointment of the Government, on petition of the counties council, under sec. 13 of the Act, and so the line run by him would be the permanent boundary of the concession (secs. 10 and 12), and I gave leave to put in copies of the petition and of his field-notes

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and other documents connected therewith from the Crown Lands Department, which was done. It appeared from this that in compliance with a petition dated the 22nd May, 1880, Mr. Hamilton had run the whole boundary between the townships of Alfred and North Plantagenet, in July and August, 1881, and planted stone monuments at all the governing points along the same, and, among others, at the north and south ends of the boundary line along the 3rd concession of Alfred, as found by Mr. Wilkie. The course between these must be, by sec. 12, thenceforth the course governing the side lines of that concession. The boundary line between them is not quite straight, as in going towards the south it inclines first a little to the west to the monument planted where the front of the 3rd concession of Plantagenet reaches it, and then inclines a little to the east until it reaches the stone at the south end of the concession; but the variation is only slight, and, by sec. 36, it is the straight line between the two ends that is to govern.

Mr. Hamilton, as his plan and field-notes shew, planted the stone monument for the actual boundary at the north-west corner of the 3rd concession of Alfred, meaning that, if a road was afterwards to be made there, it should be made half on each side of the boundary, so that the boundary stone would be in the middle of the road, as the one at the south end of the concession is. From some cause, however, the road at this end of the concession has been laid out at the west of the boundary stone, so that it is in line with the east side of the road.

Mr. Wilkie, however, not having seen Mr. Hamilton's plan or field-notes, did not take the line between those stones to be the actual boundary, but, assuming that the northern one marked the east side of the road, while the southern one was in the middle of the road, ran his boundary line from the southern stone to a point half a chain to the west of the northern stone, or in effect up along the middle of the boundary road. If he had followed the true boundary, and run his base line directly from the northern stone, the effect would have been to throw the line he ran as the boundary between the lots half a chain further west, at the south head-line, and taken that much more land off lot 34.

Mr. Hamilton's field-notes were not at hand at the trial, being put in and discussed by both counsel at a special meeting afterwards. I should think that for practical purposes the line run by Mr. Wilkie may be taken as parallel with the boundary.

The defendant's counsel did not give any evidence impeaching the correctness of Mr. Wilkie's actual work, but contended that his whole survey was illegal and invalid: first, because he did not swear the witnesses who informed him as to the boundary stones having been planted by Hamilton; second, because he did not swear the chain-bearer; and third, because he did not run the line by astronomical observations.

In connection with the first objection, it was contended that there was nothing to shew that the line taken by Wilkie as the boundary was the true boundary or that the stone monuments shewed the boundary laid out by Fortune. The production of Hamilton's field-notes, however, with the petition and plan, has shewn that the line run by Hamilton is the boundary line to govern, even if it does not correspond with Fortune's. Wilkie went by the monuments he found on the ground, and the field-notes shew that he was correct, with the exception of placing the north end of his boundary line the half chain too far to the west, and, having done so in fact, it cannot matter whether he took sworn evidence or not. He was justified, I think, at this lapse of time, in going by the permanent monuments he found on the ground, and it was not necessary to take the evidence of any witnesses on oath. There must come a time when surveyors' monuments will speak for themselves, and evidence of witnesses who saw them planted cannot be got. It is for this purpose that such monuments are planted of stone or other such durable material. Having in fact gone by the correct boundary, or rather by one which varies from it by a known extent, it was not necessary, it seems to me, that he should have sworn any witnesses.

As to his not swearing the chain-bearer, and not taking any astronomical observations, so as to run his line on the same bearing as the boundary, the method he adopted did not involve any chaining whatever nor any astronomical observations. To run the line on the same astronomic bearing as the boundary (sec. 36) seems to me the same as running the line parallel. It was said that two lines running from north to south on the same bearing will diverge from each other towards the south so as not to be truly parallel; but this objection is, I think, more ingenious than solid. The divergence of these two lines in about a mile and a quarter would be extremely small, not more than a few inches, and would

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be such a trifle as the law would not notice. The statute, sec. 36, says that the surveyor is to run the side lines of lots on the same astronomic bearing as the boundary (which he shall determine by astronomic observation or by other satisfactory method), and it seems to me that running a line parallel is a satisfactory method.

Now to run the two lines parallel two methods might be used. The surveyor might measure the distance from the boundary to his point of commencement at the north end of the concession, and then measure the same distance from the boundary at the south end, and run a straight line between these two points, and, if the two concession lines were parallel, the straight line he ran must be parallel with the boundary line. This was the method adopted in *Doe dem. Beckett v. Nightingale*, 5 U.C.R. 518, and in this the chaining would be the most important thing—in fact, all would depend on it, and the swearing of the chain-bearers might be necessary.

The other method would be that adopted in this case, in which there would be no chaining whatever, but the line run straight by pickets observed through the telescope of the instrument. If the lines were run straight and the angles correctly turned, the two lines must be parallel.

I cannot find any case, out of the very great number turning upon surveys, which implies that in all cases this swearing of chain-bearers is imperative, or whether it may not sometimes be considered directory. The case of *Huffman v. Rush*, 7 O.L.R. 346, referred to by the defendant's counsel, decides nothing as to the swearing of the chain-bearers, nor that the taking of astronomical observations is imperative. It may well be that it is not imperative where the surveyor holds one end of the chain himself. The statute, sec. 5, it is to be noticed, says that the chain-bearer is to be sworn to render a just account of his chaining or measuring, which seems to contemplate that he is working away from the surveyor. Where the surveyor holds one end himself, and can feel whether the chain-bearer is holding it properly stretched, and see, at the distance of sixty-six feet, if he is doing his work properly, it may well be that swearing should be held directory and not imperative. However this may be, I think it must be held unnecessary and not imperative in a case where no chaining is needed and nothing depends on it. He chained the distance from the post which is on the north head-line, so as to verify the position of the post which he took as the

north end of the line, but I think it was wholly unnecessary and immaterial, when that post is acknowledged by the defendant as the undisputed boundary.

Of these three methods of running one line parallel to another, one or the other might be the best according to the circumstances. Where the lines were a considerable distance apart, as say eight or ten miles, the best way would, no doubt, be to run by astronomical observations, or where the lines were not very far apart and not very long, so that a picket could be seen from one end to the other, the best method would, no doubt, be to measure the two ends. In this case, where the lines are about a mile apart and over a mile and a quarter long, the surveyor would seem to me to have adopted the most satisfactory method. To have gone by astronomical observations would have involved a double chance of error in the two observations, and, owing to the length and distance of the lines, the method adopted ought to be more accurate than chaining.

The defendant's counsel remarked that the difference between the magnetic bearing of the boundary line as given by Wilkie and Hamilton is $1^{\circ} 26'$, though I do not see just where he finds this stated by Wilkie, and that the angle between Wilkie's line and the fence is about the same (Wilkie said that the angle between his line and the fence was about one degree); but I do not see that this has any bearing on the case. The two surveys were about thirty years apart, and the magnetic bearing would change considerably in that time (see a pretty full discussion of this in the case of *Thibaudeau v. Skead* (1876), 39 U.C.R. 387); so that this different statement casts no suspicion on the survey. If it is suggested that the line of the fence may have been run at some early period according to the magnetic bearing stated by Fortune, south 16° east, without making allowance for variation, it must have been run wrong (see the last case); and, since Hamilton's survey, the boundary established by him must be followed for any parts of lines which have not been already established, though parts which have become already established by length of possession would not be altered, even if Hamilton's survey differed from the original one. See the cases of *Dennison v. Chew* (1836), 5 O.S. 161, and *Bernard v. Gibson*, 21 Gr. 195, at p. 207, where it was held that the Act of 1818, which first provided that side lines should be run parallel to the boundary

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line, applied only to "unadjusted cases," and the line here through the bush is an "unadjusted case."

The result is that I hold that the boundary line through the bush between the lots is Wilkie's line, touching the south head-line one chain and eighty-one links west of the fence planted by the plaintiff on the north side of the head-line at the line claimed by the defendant, or a line half a chain further west, but, as that has not been run out, the plaintiff will probably be satisfied to go by Wilkie's line, and that for a distance of six chains north from the south head-line, being as far north as the south end of the defendant's fence, the plaintiff can claim the land west to the said line between the lots; but that northward from the south end of that fence to the Treadwell road, the fence has become established as the line between the plaintiff's and defendant's land.

As to the amount of damages, the plaintiff does not seem to me to be entitled to much. The defendant did not commit the trespass wantonly or deliberately. He had considerable reason for thinking that the plaintiff was satisfied with the line they had run out, and the plaintiff did not forbid the cutting or do anything till after it was done, when he forbade the removal of the wood cut. The defendant has given his evidence very candidly and honestly, though unfortunately for him it is largely on his own statements that I have had to decide against him. The plaintiff said that he realised \$50 an acre clear from the wood he cut off the land adjoining to the east, which, as the extent of land cut over cannot be over a quarter of an acre, would make the net value \$12.50, if this was an average piece of the wood. The defendant said that the land was not worth more than \$25 an acre, wood and all, and the defendant's witness, McCormick, said he had bought some standing wood better than that for \$12 an acre, though another of the defendant's witnesses said the timber on the piece cut was a little better than the average on account of some hemlock trees on it. Two of the plaintiff's witnesses had measured and counted the stumps, and said there were one hundred and twenty-nine of hard wood, but of these there were only two of ten inches and only two of twelve inches in diameter, and all the rest smaller, while by far the greater number were of two or three inches, mere saplings, and thirty-three of soft wood, of which only eleven were of twelve inches in diameter or over, in fact one of seventeen, one of fifteen,

and one of fourteen inches, while the greater part of the rest were of two inches in diameter, mere brushwood.

The larger soft wood trees were of hemlock and were cut into saw-logs, which, the defendant's witnesses said, were knotty and of poor quality. Their evidence as to the quality and value impressed me more than that of the plaintiff's witnesses, who had never seen the trees, only the stumps, and who unanimously stated the damages at \$200 to cover everything, wood, breaking down wires, damage to pasture, trouble of plaintiff, and without giving any details. The defendant valued the logs so little that he gave them away to the man that cut the wood for him. I can scarcely credit it that the plaintiff meant to keep this piece as a reserve for wood and timber, seeing that he cut off all the rest south of the road to remove the danger of fire to a more valuable piece of woods he had on the other side of the road, as he said.

I think the sum of \$25, paid by the defendant into Court, is sufficient to cover the damages the plaintiff is entitled to, including the cost of the survey, which it appears from *McGannon v. Clarke* (1883), 9 P.R. 555, may be included in the damages, and cannot be allowed in taxation. If the surveyor had been brought on by mutual agreement, the plaintiff would have been willing to pay half the cost.

As to the claim for an injunction, it appears from the case of *Fitchett v. Mellow* (1898), 18 P.R. 161, that such a judgment as was given in that case (1897), 29 O.R. 6, could have been given by a County Court.

I, therefore, give judgment for the plaintiff for the sum of \$25, being the money paid into Court, and for a perpetual injunction restraining the defendant from trespassing upon the piece of land in question, above mentioned, to which I have held the plaintiff is entitled, with costs, of course on the County Court scale.

The defendant appealed.

October 4. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., MACLAREN, J.A., and RIDDELL, J.

J. A. MacInnes, for the defendant. The main issue between the parties is as to what is the true boundary line between their farms. It is submitted that, on the evidence, the learned trial

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Judge should have found that there was an agreement between the plaintiff and defendant under which this line was established, and under which the defendant was justified in claiming the land in respect of which the alleged acts of trespass were committed. Even if no such agreement existed, the defendant was entitled to the land in question under the Statute of Limitations, inasmuch as it lay to the west of the line which would be formed by the continuation of the established fence line, and the evidence shewed that the plaintiff had purchased his property with reference to such continued line, and had acquiesced in acts of ownership and possession on the part of the defendant in respect to the land in dispute. [RIDDELL, J., referred to the unreported case of *Rogers v. Nixon*, in which the facts were very similar to those in the case at bar; it was nevertheless held that the acts of possession relied on by the defendant had no effect in giving title by the statute.] Even if the Court should consider itself bound by that decision, there are ample grounds on which it would be justified in holding that, ever since the lots were settled, the owners had agreed upon a line which should define their respective holdings; and, when a substantial part of that line had been established, as in the present case, the rest would follow in the same direction—it is the agreement, and not the fence, that makes the line: *Forrest v. Turnbull*, 14 O.W.R. 478; *Davis v. Henderson*, 29 U.C.R. 344; *Shepherdson v. McCullough*, 46 U.C.R. 573; *Steers v. Shaw*, 1 O.R. 26. [RIDDELL, J., thought that in this case the adjoining owners did not intend to fix the true line between the lots, but merely a conventional line, by which they would abide so far as it went.] In any case, the evidence shews that the plaintiff has not, as he was bound to do, made out the true line between the lots, and, if so, his action must fail. The learned trial Judge erred in holding that the true line was established by the evidence of the surveyor Wilkie, who had failed to conform to the rules laid down by the Surveys Act, R.S.O. 1897, ch. 181. Wilkie was not even aware that the governing line had been fixed under official sanction by Hamilton's survey made in 1880, and neglected to take astronomical observations, as directed by sec. 36, or to swear the witnesses upon whose evidence he found the location of the monuments: *Huffman v. Rush*, 7 O.L.R. 346. The plaintiff had not such possession of the land in question as would entitle him to sue in trespass: *Street v. Crooks* (1856), 6

C.P. 124. [RIDDELL, J., remarked that in any case the plaintiff would be entitled to sue for a declaration of title; and the result would be the same.] The plaintiff is merely a tenant under his mortgage to the Canada Permanent Mortgage Corporation, and has not the constructive possession that would entitle him to sue. [RIDDELL, J., referred to the unreported case of *McMullen v. Free*, as being opposed to counsel's contention.] The trial Judge should not have given costs against the defendant, who has paid money into Court sufficient to pay all damages assessed against him.

C. G. O'Brian, for the plaintiff. I rely upon the reasons and authorities set forth in the judgment of the learned trial Judge, to which it is necessary to add but little. The Judicature Act, sec. 58, sub-sec. 4, is a sufficient answer to the contention that a mortgagor is not entitled to sue in trespass: see *Fairclough v. Marshall* (1878), 4 Ex. D. 37. As to the validity of Wilkie's survey, I refer to *Artley v. Curry* (1881), 29 Gr. 243, 251. Whether or not Wilkie knew that Hamilton's survey was official, the evidence shews that, as a matter of fact, he adopted Hamilton's posts. As to the suggested production of a mere conventional line, see Hunter's Real Property Statutes, p. 368, and the cases there cited, especially *Doe dem. Beckett v. Nightingale*, 5 U.C.R. 518; see also on this point *Huffman v. Rush*, *supra*, where the cases are reviewed. Cases like *Forrest v. Turnbull* and *Steers v. Shaw* are distinguishable. It is not necessary under the Surveys Act for the surveyor to take astronomical observations, provided he can "by other satisfactory method" determine the course of the side lines, and the method adopted by him was approved by competent authority. All that was required from the plaintiff was to make out a good *primâ facie* case for the correctness of the survey upon which he relied, and this, it is submitted, has been done.

MacInnes, in reply.

October 10. The judgment of the Court was delivered by RIDDELL, J.:—This unfortunate law-suit between two neighbour farmers seems to have been occasioned by a temporary lapse into what he calls "crankiness" by one of two intelligent and honest people, and is wholly to be regretted.

The township of Alfred, in the county of Prescott, lies with its north end upon the Ottawa river—the governing line is the western

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boundary, which runs approximately north and south and between the townships of Alfred on the east and North Plantaganet and South Plantaganet on the west: the concession lines are at right angles to the governing line and a mile and a quarter apart: the lots are a quarter of a mile wide, and contain two hundred acres each—they number from east to west.

The plaintiff owns, subject to a mortgage, lot 33 in the 3rd concession, and the defendant lot 34, immediately to the west thereof. Most of the line between these lots has been fixed for years, and the action concerns only about six rods at the south. The action is in trespass to determine the boundary at that place.

One defence set up is an alleged agreement between the adjoining owners, but I agree with the learned trial Judge that this is not established. No doubt, part of the line between the two lots had been agreed upon or fixed by the Statute of Limitations, but, as pointed out by the trial Judge, this has no effect in or toward establishing a line in continuation thereof.

The main defence at the trial was the Statute of Limitations, but it is quite clear that this defence also fails. In addition to the cases cited in the very able judgment of the County Court Judge, I would refer to a case curiously like the present.

In *Rogers v. Nixon*, argued before the Queen's Bench Division, 25th November, 1889, judgment given at the same sittings, 21st December, 1889 (Q.B.D. Term Book, No. 5, pp. 1, 8), two neighbours had had established by the Statute of Limitations their land to the north—at the south there was a wood, rather wet. The plaintiff had a brush fence through this wood, and kept it up for more than ten years. In the wood on his side of this fence his cattle ranged, and he from time to time cut fence poles and firewood over the space, while his neighbour never came upon the property or exercised any rights of ownership over any part of the territory. At the trial, following a then recent unreported case in the Common Pleas Division, it was held that such possession and such acts of ownership could not be of any effect in giving title by the statute. An appeal was argued before the Queen's Bench Division (Armour, C.J., and Street, J.), and the appeal was dismissed. Every argument addressed to us in this case was pressed upon the Divisional Court in that case, but in vain. There is nothing in the present case to take it out of *Rogers v. Nixon*; and that ground of appeal must fail.

“Entry is not equivalent to possession:” *per* Fry, J., in *Edwick v. Hawkes* (1881), 18 Ch.D. 199, at p. 203.

While it is plain that, at the trial, the real defence was based upon the statute, both before the learned trial Judge and this Court it was earnestly and ably contended that the plaintiff had not made out the true line. It is true that the defendant does not suggest any other line, but he relies, as he may, upon an alleged failure of the plaintiff to make out his case.

The original survey of the township was by William Fortune, D.P.S., in 1797, under instructions from the Survey Branch of the Department of Lands, Forests, and Mines, of October, 1796. In May, 1880, the county council of the united counties of Prescott and Russell petitioned the Lieutenant-Governor, stating that stone monuments or monuments of other durable material never having been placed at the several corners governing points of the east boundary line of the township of North Plantaganet, or at the corresponding points of the west boundary of the adjacent township of Alfred . . . the original lines had become obliterated—the petition asked for a survey of the east boundary line of North Plantaganet and the west boundary line of Alfred, from the Ottawa river to the front of the 11th concession, and that durable monuments should be placed at the several corners, governing points, and offsets of the line. This petition was granted in the same month; and Robert Hamilton, P.L.S., was appointed to make the survey. He did so; and, amongst other things, placed a stone monument at the north-west corner of the 3rd concession of Alfred, at the place at which an old post had previously been. For some reason which does not appear, the road between the two townships, instead of being taken half off each township, so that this monument would be in the centre of the road, was wholly taken off North Plantaganet, and the true boundary of the townships is consequently there on the east side of the road. Hamilton also placed a stone monument at the south-west corner of concession 3, and the line between these became the true western boundary of the township and the governing line: R.S.O. 1897, ch. 181, secs. 14, 15, 17, 23, 24, 36. The road at the south-east corner is rightly placed so that the monument is in the middle of the road. A survey was made for the plaintiff by Mr. Wilkie, who found these two posts, but, not having heard of Hamilton’s survey, thought the monu-

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ment at the north was at the true position for the east side of the road, thirty-three feet east of the west boundary of Alfred. I do not think there can be any doubt, in fact, that the stones found by Wilkie were those placed by Hamilton; and the objection to them was very feebly urged.

The result is that the line which Wilkie found makes an angle with the true line of about $(\tan. - 1 \ a = \frac{33}{6600} = .00500: a =) 1' 43''$

south and east. Then he took a post on the north-east corner of 34, of which the defendant says that, if not the original post, it is one that was put in the same place. This is ample evidence as against the defendant of this post being at the place of the original post, and that it is so is undisputed. Thereupon Wilkie ran from this last-named post a line parallel to the line he had determined from Hamilton's monuments—it is plain that he thus ran the line a short distance—thirty-three feet—east of the true line at the south end of the lot—so that the line he found took off certain of the land of the plaintiff and put it on the lot of the defendant. The plaintiff is, however, satisfied with Wilkie's line, and certainly the defendant cannot complain.

The defendant raised before us the same objections he raised before the trial Judge. A Court is not concerned with the question whether the surveyor took the prescribed means for determining his data—he should of course follow the directions of the statute—but the Court is concerned with the facts; and not with the manner of determining the facts. There can be no doubt that the monuments planted by Hamilton were found by Wilkie, and it is a matter of indifference what method he adopted to satisfy himself that they were real monuments, or whether he took any, or whether he was himself satisfied. In reality we do not take his conclusions as to the points these monuments mark, and we do not trouble to inquire if he came to the conclusion he did on proper evidence.

As to the post at the north-east corner of lot 34, the evidence of the defendant himself is quite enough.

Much complaint is made that Wilkie did not take astronomical observations, as it is argued he should have done under sec. 36. It would be a sufficient answer to say, as has already been said, that the Court is concerned with the true line and not with the surveyor's method of finding it or laying it down. But there is no

necessity for finding the true astronomical bearing of the governing line, so long as the line to be run is on the same astronomical course, that is, has the same astronomical bearing. For surveys of the kind in question the surface of the earth may be considered a plane and not a sphere, and a parallel line may be considered a line on the same astronomical bearing. I have made a computation, and find that, for the distance here in question, the difference between the result found by using a parallel and one found by using a line on the same astronomical course is microscopical (being indeed less than one ten-thousandth of an inch). Any possible error by adopting this method is enormously less than can be detected by any instrument in the hands of a surveyor.

No surveyor in his senses would think of taking for a survey of this kind astronomical observations. It is not simply finding the angle of the course with a line drawn to the north star—Polaris is only twice a day at the true north. Repeated observations and computations requiring extreme accuracy are needed; and it is not often that the tables, etc., required, are at hand. The chances of error are very much greater in this method than in the usual and simple method of striking a cross-line and laying off a line, making with this line the same angle as the governing line on the same sides and in the same direction. That these two lines will then be parallel is obvious to all but mathematicians, and they prove it by what they conceive to be simpler axioms.

This was the method in substance followed by Wilkie, and his line was clearly parallel to the assumed governing line.

The remaining argument for the defendant is that the plaintiff had not such possession as enabled him to sue in trespass. *Street v. Crooks*, 6 C.P. 124, is relied upon. But bearing in mind that no other person was in actual possession of the land in question, the case does not support the proposition. As is pointed out at p. 127 of the report, "the title draws the possession to it if there be no other party actually in possession," and the plaintiff failed there because there was some one else in actual possession. There can be no doubt that where one has the paper title to a piece of land and comes upon it and occupies in fact part thereof, he is considered in law in possession of the whole unless another is in actual physical occupation of some part to the exclusion of the true owner. *Re Bain and Leslie* (1894), 25 O.R. 136, at p. 141, is one of many cases; see, e.g., *Heyland v.*

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Scott (1869), 19 C.P. 165, at p. 172. But, if he has no title, he is in possession in law only of that part of which he is in possession in fact: *Lake v. Briley* (1848), 5 U.C.R. 136, and many other cases.

The possession was certainly as much here as in *Conway v. Brookman* (1903), 35 S.C.R. 185. Assuming the rule as to trespass to be as stated in *Street v. Crooks*—and *Baker v. Mills* (1886), 11 O.R. 253, may be looked at upon that point—and assuming further that the form of action is now of any importance, there was sufficient possession in the plaintiff to satisfy the rule.

The fact that he is a mere mortgagor is rendered immaterial by the Ontario Judicature Act, sec. 58 (4); *McMullen v. Free*, Chancery Division (unreported).*

The defendant complains that he has been saddled with costs, although he paid money into Court and no further or greater amount of damages has been assessed against him. But he did not admit the plaintiff's title, which was the main matter in dispute, and it was necessary for the plaintiff to proceed to trial to obtain his desired relief.

I cannot find anything in the conduct of the plaintiff which should deprive him of costs; he seems throughout to have acted most reasonably, and as one who did not desire unduly to press his own rights or at all to encroach upon those of others.

I do not think there is any error in the conclusions of the Court below, and I entirely concur in the able written judgment of the County Court Judge.

The appeal should be dismissed with costs.

* Decision of a Divisional Court (Boyd, C., and Proudfoot, J.), 8th January, 1887.

[CLUTE, J.]

DAWSON V. NIAGARA AND ST. CATHARINES R.W. CO.

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Oct. 11.

Damages—Workmen's Compensation for Injuries Act, sec. 7—Death of Workman—Action by Widow—Assessment of Damages by Jury—Deduction of Insurance Moneys—Correction of Verdict—Judgment.

In an action under the Workmen's Compensation for Injuries Act, by the widow and administratrix of a man who was killed while in the employment of the defendants, to recover damages as compensation for his death, the evidence shewed that the damages, based upon an estimate of the wages for three years of a person in the same grade as the deceased, would amount to at least \$2,200. Counsel for the plaintiff, however, in addressing the jury, told them that they should deduct from the amount they found on that basis a sum of \$1,000 which the plaintiff had received for insurance on the life of the deceased. The jury announced a verdict of \$1,200, not saying that they had found \$2,200 and deducted \$1,000; but the trial Judge asked them if that was what they meant, and they said it was:—

Held, having regard to sec. 7 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, that the \$1,000 ought not to have been deducted; and that, upon the findings of the jury, judgment should be entered for \$2,200.

Beckett v. Grand Trunk R.W. Co. (1885), 8 O.R. 601, 13 A.R. 174, 16 S.C.R. 713, and *Grand Trunk R.W. Co. v. Jennings* (1888), 13 App. Cas. 800, specially referred to.

THIS was an action brought by the widow and administratrix of George William Dawson, who was killed while in the employment of the defendants. The action was brought under the Workmen's Compensation for Injuries Act, to recover damages for his death.

October 3 and 4. The action was tried at St. Catharines before CLUTE, J., and a jury.

The jury found that the defendants were guilty of negligence that caused the accident; that the death was caused by a defect in the condition of the ways and plant, and also by reason of negligence of the superintendent, whose order the deceased was bound to obey and did obey, while acting in obedience to such order; and that the deceased was not guilty of contributory negligence.

E. A. Lancaster, K.C., and E. H. Campbell, for the plaintiff.

McGregor Young, K.C., and G. F. Peterson, for the defendants.

October 11. CLUTE, J.:—In addressing the jury, counsel for the plaintiff, under what I think was a misapprehension of the law and of the rights of his client, told the jury that they should find what was equal to the wages for three years for a person in the

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same grade as the deceased, which would amount to between \$2,200 and \$2,400, and from that they should deduct \$1,000 for insurance which the plaintiff had received.

I endeavoured to correct this in my charge to the jury, and, on their returning a verdict of \$1,200, it was quite obvious that they had deducted the \$1,000 for insurance, but did not say so in their verdict. Thereupon I asked them if they meant to find that \$2,200 was the damages, and from that had deducted \$1,000, leaving \$1,200 as the verdict, and to that they all answered that that is what they meant.

There is no doubt, upon the evidence, that the damages would at least amount to \$2,200, and from that the jury deducted \$1,000.

The question is, whether the verdict should be entered for the \$1,200 or \$2,200.

In *Beckett v. Grand Trunk R.W. Co.* (1885), 8 O.R. 601, a Divisional Court held, Wilson, C.J., dissenting, that the policy of insurance on the life of the deceased had been improperly directed by the learned Judge at the trial to be deducted from the damages assessed by the jury. *Per* Wilson, C.J., that the whole amount of such policy should be deducted. The Court of Appeal upon this point were equally divided (1886, 13 A.R. 174), and the appeal was thereupon dismissed. The Supreme Court of Canada held that the judgment should be affirmed: *Grand Trunk R.W. Co. v. Beckett* (1887), 16 S.C.R. 713.

In *Grand Trunk R.W. Co. v. Jennings* (1888), 13 App. Cas. 800, Lord Watson, after referring to the *Beckett* case, said (p. 803): "In this appeal the appellants have raised precisely the same point which they unsuccessfully pressed in *Beckett's* case. They have never, in the Courts below, suggested that the receipt of the insurance money by the widow was merely one of the circumstances which ought to be taken into account by the jury in estimating her pecuniary loss; their contention has all along been, that the primary duty of the jury is to assess damages, irrespective of any such consideration, and that the Court or the jury are then bound, as matter of law, to deduct from the damages assessed on that footing the full amount paid to the widow under the policy . . . In *Beckett's* case, as well as in the present, all the Courts below have justly held that the right conferred by statute to recover damages in respect of death occasioned by wrongful act, neglect, or default, is re-

stricted to the actual pecuniary loss sustained by each individual entitled to sue. In some circumstances, that principle admits of easy application; but in others, the extent of the loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture. When a man has no means of his own, and earns nothing, it is obvious that his wife or children cannot be pecuniary losers by his decease. In like manner, when by his death the whole estate from which he derived his income passes to his widow, or to his child (as was the case in *Pym v. Great Northern Railway Co.* (1862-3), 2 B. & S. 759, 4 B. & S. 396), no statutory claim will lie at their instance. A very different case arises when the means of the deceased have been exclusively derived from his own exertions, whether physical or intellectual. It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work, and remuneration; and also how far these, if realised, would have conduced to the benefit of the individual claiming compensation. Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding Judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages, must depend upon the nature of the provision and the position and means of the deceased. When the deceased did not earn his own living, but had an annual income from property, one-half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine their estimate of her loss to the interest which she might probably have had in the other half. Very different considerations occur when the widow's provision takes the shape of a policy on his own life, effected and kept up by a man in the position of the deceased William Jennings. The pecuniary benefit which accrued to the respondent from his premature death, consisted in the accelerated receipt of a sum of money,

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the consideration for which had already been paid by him, out of his earnings. In such a case, the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration." The appeal was thereupon dismissed.

That action, it will be observed, was under Lord Campbell's Act, and, had the damages in the present case been assessed under Lord Campbell's Act, without the limitation imposed by the Workmen's Compensation for Injuries Act, it could scarcely be doubted that, having regard to the earning power of the deceased, his age, and that of the plaintiff, a very much larger verdict would have been given.

It may be noted that the law was changed under Lord Campbell's Act in England, in 1908. By 8 Edw. VII. ch. 7, it is provided that, in assessing damages under the said Act, there shall not be taken into account any sum paid or payable under any contract of insurance, whether before or after the passing of the Act.

Section 7 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, which limits the amount of compensation, also provides that "such compensation shall not be subject to any deduction or abatement, by reason, or on account, or in respect of any matter or thing whatsoever, save such as is specially provided for in section 12 of this Act." Section 12 has no reference to insurance.

Having regard to this section, I am of opinion that the jury, having found the damages to be \$2,200, ought not to have deducted the \$1,000 for insurance, and, there being no dispute as to their having found the amount of damages, I am entitled, upon their answers, to direct judgment to be entered for the sum so found, namely, \$2,200, which I accordingly do, with costs of action.

[IN THE COURT OF APPEAL.]

HAMMOND V. BANK OF OTTAWA.

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Company—Winding-up—Mortgage Made within Three Months—Presumption—Rebuttal—Pressure—Authorisation—By-law of Directors—Powers—Ontario Companies Act, secs. 73, 78—Mortgage to Bank to Secure Existing Liability—Erroneous Recital—Objection to By-law—Action by Liquidator.

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The defendants, a chartered bank, advanced \$6,000 to a brewing company in the ordinary course of dealing. Frequent demands for payment having been made, the company agreed to secure the amount by mortgage on their lands, and the directors met and passed a by-law for the purpose of implementing the agreement. The by-law contained a recital that sec. 73 of the Ontario Companies Act authorised the directors to borrow money for the purposes of the company. This assertion was unnecessary, and was also inapplicable, as the directors were not about to borrow or give security for a present loan, but to secure by mortgage an existing liability. Aside from this, the by-law contained all that was necessary to authorise the preparation and execution by the president and secretary of a mortgage to secure the liability of \$6,000:—

Held, in an action by the liquidator of the company for a declaration that the mortgage was void, that, the debt being an outstanding liability of the company, and the intention and agreement being to mortgage the company's real property, sec. 78 of the Act gave the directors ample power to do so, and all that was needed was that they should act under the powers vested in them by that section; and the by-law was a sufficient authorisation of the mortgage, notwithstanding the recital referring to sec. 73 and the failure to refer to sec. 78.

Held also, per Moss, C.J.O., that the objection to the by-law was not open to the company, and in this respect the plaintiff, as liquidator under a winding-up order, occupied no higher position. The defendants, having received a mortgage apparently duly executed on behalf of the company, were entitled to assume that everything necessary to its valid execution had been regularly and properly done.

Judgment of SUTHERLAND, J., upon this branch of the case, reversed.

Held, also, per curiam, that the presumption of intent to defraud the company's creditors, arising from the circumstance that the mortgage was made within three months next preceding the commencement of the winding-up (sec. 94 of the Winding-up Act), was rebuttable, and, upon the evidence, was rebutted, pressure being shewn.

Judgment of SUTHERLAND, J., upon this branch of the case, affirmed.

ACTION by C. E. Hammond, liquidator of the New Ontario Brewing Company Limited, against the Bank of Ottawa, to have a certain mortgage made by the company to the defendants declared fraudulent and void and set aside or discharged.

November 29, 1909. The action was tried at North Bay, before SUTHERLAND, J., without a jury.

M. G. V. Gould, for the plaintiff.

G. H. Kilmer, K.C., for the defendants.

March 15, 1910. SUTHERLAND, J.:—The New Ontario Brewing Company Limited was incorporated under the laws of the Province of Ontario, with its head office at North Bay.

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On and before the 8th December, 1908, the said company was indebted to the Bank of Ottawa in the sum of \$6,000. On that day the directors of the company passed a by-law in the following terms:—

“Whereas the Ontario Companies Act, section 73, authorises the directors of this company to borrow money for the purposes of the company.

“And whereas the directors of the company have borrowed from the Bank of Ottawa the sum of \$6,000 for the purposes of the company.

“And whereas the directors have deemed it necessary and expedient to give to the Bank of Ottawa a mortgage upon the property of the company to secure the sum of \$6,000.

“Now, therefore, be it enacted and it is hereby enacted that the directors of the company, having borrowed the sum of \$6,000 from the Bank of Ottawa, upon the credit of the company, may issue bonds, debentures, mortgages, or other securities of the company, charge, hypothecate, mortgage, or pledge all or any part of the real or personal property, rights and powers, of the company, to secure such bonds, debentures, mortgages, or other securities, or any liability of the company.

“And it is further enacted that the president and the secretary be empowered to sign all documents necessary to secure the said loan of \$6,000.”

On the 22nd December, 1908, a special meeting of the shareholders of the company was held at its head office in North Bay for the purpose, among other things, of considering the said by-law.

On said last mentioned date, in pursuance of such by-law and of the alleged confirmation thereof by the shareholders at the said meeting, a mortgage, also dated the 22nd December, 1908, was executed by the company in favour of the bank, for the said sum of \$6,000, upon property in North Bay then owned by the company.

The company was then undoubtedly in financial difficulties and unable to pay its debts in full, and the defendants in this action—the Bank of Ottawa—later applied for a winding-up order under R.S.C. 1906, ch. 144, and amending Acts, which they obtained on the 11th February, 1909. On the same day an order was also obtained appointing John W. McNamara, of North Bay, provisional liquidator, and a reference directed to the Local Master at North Bay to appoint a permanent liquidator.

On the 31st March, 1909, the plaintiff—C. E. Hammond—was duly appointed by the said Master permanent liquidator of the company, and, on the 15th October, 1908, he secured the approbation and consent of the said Master to this action being brought, as appears by a certificate filed on the trial of the action.

The plaintiff in his statement of claim seeks relief under sec. 94 of the Winding-up Act, R.S.C. 1906, ch. 144,* alleging that the mortgage in question, having been made within three months next preceding the commencing of the winding-up of the company, and being voluntary or gratuitous, without consideration or with a merely nominal consideration, must be presumed to be made with intent to defraud the creditors. In face of the fact that the consideration mentioned in the mortgage, \$6,000, was proved at the trial to have consisted of an existing debt from the company to the bank and that the bank was endeavouring to get security therefor, I cannot find that the plaintiff is entitled to succeed under that section.

The mortgage is, however, attacked by the plaintiff on the further grounds: (1) that no by-law of the directors of the company was passed authorising the said mortgage, as required by the Ontario Companies Act. I assume the plaintiff to refer in his pleading to sec. 73 of the Ontario Companies Act, 7 Edw. VII. ch. 34.† At all events, it is under that section of the Act that the directors assumed to act in passing the by-law, as appears on its face. So far as the mere formal passing of the by-law is concerned, it has apparently been regularly passed. It is the only action of the directors of the company apparently intended to authorise the giving of the mortgage in question, and it is expressly said to have been taken under and in pursuance of the section referred to. But, when we come to carefully read sec. 73, can it be said to apply, or can it be construed as applying, to a mortgage given to secure an existing debt or liability? Is not the clear reference in the section to the borrowing of

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*94. All gratuitous contracts, or conveyances or contracts without consideration, or with a merely nominal consideration, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever, whether a creditor of the company or not, within three months next preceding the commencement of the winding-up, or at any time afterwards, shall be presumed to have been made with intent to defraud the creditors of such company.

†73. The directors of a corporation may make by-laws:—

(a) For borrowing money; . . .

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money on the part of the company by the issue of bonds, debentures, or other securities? I think it is, and, if so, this by-law, which was not passed for such a purpose, but to secure an existing debt, is without effect for the purpose of making valid the mortgage in question. If this be so, then the mortgage never was properly authorised by the company, and the question of its ratification under sec. 74* becomes of no practical importance. As a matter of fact, if it is important to decide whether the by-law was properly ratified under sec. 74, I find that it was not. Upon the evidence, it does not appear to have "been confirmed by a vote of two-thirds in value of the shareholders present in person or by proxy at a general meeting of the company."

But it was contended on behalf of the defendants that it is sec. 78† that applies, and that under it no confirmatory by-law is necessary. A sufficient answer to that contention is that the by-law on its face expressly assumes to be passed under sec. 73, and a by-law so passed has no effect until it is so confirmed. Section 78 appears to be merely supplemental to sec. 73, and to authorise the directors to "charge, hypothecate, mortgage," etc., the "property" of the company "to secure any bonds," etc., duly authorised under sec. 73.

I find, therefore, that the mortgage in question was not properly authorised by the company, and must be set aside. There will, therefore, be judgment for the plaintiff, as liquidator of the New Ontario Brewing Company Limited, to that effect, and the defendants will execute a discharge of the said mortgage.

The plaintiff will have the costs of the action.

The defendants (by special leave) appealed from the judgment of SUTHERLAND, J., directly to the Court of Appeal.

May 4. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

G. H. Kilmer, K.C., and J. A. McAndrew, for the appellants.

*74. No by-law referred to in the last preceding section shall take effect until it has been confirmed by a vote of not less than two-thirds in value of the shareholders . . . or unanimously sanctioned in writing by the shareholders of the company.

†78. The directors may charge, hypothecate, mortgage, or pledge any or all of the real or personal property . . . of the corporation to secure any bonds, debentures or other securities or any liability of the corporation.

The by-law of the directors authorising the mortgage was valid without the sanction of the shareholders. The debt of the company to the bank was a past debt, not disputed, and must be assumed to have been properly incurred; and, where there is an existing obligation, the directors have power, under sec. 78 of the Companies Act, to execute a mortgage to secure the liability. The assent of two-thirds in value of the shareholders present at a meeting duly called for the purpose of sanctioning the mortgage is sufficient under sec. 74 of the Act, and it has been proved that such assent was given. The mortgage, having been made for valuable consideration, was not a "gratuitous contract" within the meaning of sec. 94 of the Winding-up Act. "Gratuitous" there means "made without binding consideration," as defined in Wharton's Law Lexicon, 10th ed., p. 350. There is, therefore, no presumption of its invalidity under that section. A transfer to a creditor by way of security, such as that now in question, properly comes under sec. 98 of the Act, under which the presumption that it has been made in contemplation of insolvency only arises if the transfer is made within thirty days before the commencement of the winding-up. The trial Judge has found as a fact that it was not a voluntary conveyance, and no other section of the Act, having relation to fraudulent preferences, is applicable: *Kirby v. Rathbun Co.* (1900), 32 O.R. 9.

• *J. M. Ferguson*, for the respondent. The mortgage was a gratuitous conveyance, made to a creditor, within the meaning of sec. 94 of the Winding-up Act, and, as it was made within three months next preceding the commencement of the winding-up, must be presumed to have been made with intent to defraud creditors. The onus of rebutting that presumption has not been discharged by the appellants. The section follows closely the wording of sec. 86 of the Insolvent Act of 1869, and of sec. 130 of the Insolvent Act of 1875, and is different from the corresponding section in the Insolvent Act of 1864, under which *Newton v. Ontario Bank* (1867), 13 Gr. 652, was decided, and in which the expression "whether a creditor of the company or not" does not occur. The insertion of these words in the Insolvent Acts passed after the decision in the *Newton* case, and in sec. 94 of the Winding-up Act, indicates that the fact that a mortgage such as the one in question was made to a creditor does not deprive it of the character of a "gratuitous contract," and that a previous indebtedness is not a

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consideration, within the meaning of that section. The mortgage in question was a security within the meaning of sec. 73 of the Companies Act, and thus required confirmation in the manner provided by sec. 74, and, as such confirmation was not given, there was no authority to give the mortgage.

Kilmer, in reply.

October 13. Moss, C.J.O.:—Appeal by the defendants from a judgment of Sutherland, J., delivered after trial of the action without a jury, setting aside a mortgage made to the defendants by the New Ontario Brewing Company Limited, a company incorporated under the Ontario Companies Act.

Upon petition presented on the 11th February, 1909, under the Dominion Winding-up Act, the company was declared to be insolvent and liable to be wound up. Subsequently the plaintiff was appointed permanent liquidator, and brought this action with the approbation and consent of the Local Master of the Supreme Court of Judicature at North Bay. The mortgage in question was made and dated on the 22nd December, 1908, less than three months before, but more than thirty days after, the commencement of the winding-up.

It is attacked on two grounds: (1) that it was given voluntarily and without consideration, or for a merely nominal consideration, when the company was insolvent, and with intent to give the defendants a preference over the other creditors of the company; and (2) that no by-law of the directors authorising the mortgage was passed or confirmed by the shareholders.

The defendants, besides denying the allegations of the statement of claim, set up that the mortgage was given under pressure and for valuable consideration without knowledge of insolvency, if such existed, and that the mortgage was duly authorised and executed on behalf of the company.

The learned trial Judge held against the plaintiff on the first branch of his case, but decided the second in his favour.

After the appeal was argued we directed that the parties be at liberty, if so advised, to adduce further evidence bearing on the defence of pressure, and consideration, as set up in the third paragraph of the statement of defence, and both parties availed themselves of the privilege. This evidence is now before us, but in deal-

ing with the appeal it may be convenient first to dispose of the branch of the case upon which the plaintiff succeeded at the trial.

For some time prior to and on the 8th December, 1908, the brewing company was indebted to the defendants to the amount of \$6,000 for moneys advanced in the ordinary course of dealing between them. Frequent demands for payment had been made by the defendants upon the company, with the result that the company agreed to secure the amount by mortgage upon their lands. On the 8th December the directors met and passed a by-law, undoubtedly with the intention and for the purpose of implementing the agreement. But, through some misconception, the by-law was so drawn as to contain much more than was necessary to express and give effect to the intention. The debt of the defendants at that time being an outstanding liability of the company, and the intention and agreement being to mortgage its real property, sec. 78 of the Ontario Companies Act gave the directors ample powers to do so, and all that was needed was that they should act under the powers vested in them by that section. But the by-law as passed contains a recital that sec. 73 of the Ontario Companies Act authorises the directors of the company to borrow money for the purposes of the company. This assertion of the powers of the directors was, of course, wholly unnecessary, and was, besides, inapplicable, inasmuch as the directors were not about to borrow or give security for a present loan, but to secure by mortgage an existing liability. Putting aside this recital, the remainder of the by-law, though not very happily expressed, is not inapplicable in substance to the true purpose with which it was framed. It contains all that is necessary to authorise the preparation and execution by the president and secretary of a mortgage to secure the liability of \$6,000.

Is the presence of the first recital sufficient to prevent the by-law from having effect and operation as authorising a mortgage under sec. 78? So to hold is completely to nullify the by-law; for by no construction can it be made to read as applying to any other transaction than on foot with the defendants requiring to be dealt with by by-law. The only transaction calling for action by the directors towards giving a security was the agreement to give a mortgage to secure the existing debt. Unless the statement contained in the by-law that the company has borrowed \$6,000

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from the defendants is to be understood as meaning the previous advances and the liability for them, the statement is wholly untrue. So, also, with regard to the further statement that "the directors having borrowed the sum of \$6,000 from the Bank of Ottawa upon the credit of the company," which precedes the authorisation to them to mortgage the company's property for securing the same.

There does not appear to be any good reason for giving to a recital in a by-law of the directors of a company any greater force or effect than is to be given to a recital in an Act of Parliament; and with regard to that it has been said that "a mere recital in an Act of Parliament, either of fact or law, is not conclusive; and we are at liberty to consider the fact or the law to be different from the statement in the recital." See *The Queen v. Inhabitants of Haughton* (1853), 1 E. & B. 501, at p. 516. Here the first recital is true in law and in fact, but it has no relation to the actual transaction aimed at. And the other recitals are not untrue when taken in connection with the actual facts; but they would be if treated as applying to a transaction of borrowing under sec. 73. The company had borrowed \$6,000 from the defendants, not at the time when the by-law was being passed, but long previous thereto, and the directors, now deeming it necessary and expedient to give the defendants a mortgage to secure the \$6,000, take steps for the purpose. Under sec. 78 the directors had power to do all that the by-law authorised, and it ought not to be considered that the failure to refer to all the powers enabling them to do the act should render it nugatory.

In the case of individuals possessing and exercising powers of appointment or sale it has been so held. See *Kelly v. Imperial Loan Co.* (1884-5), 11 A.R. 526, 11 S.C.R. 516, and cases there cited.

Further, there is to be borne in mind the principle that this objection would not be open to the company, and that in this respect the plaintiff occupies no higher position.

The defendants, having received a mortgage apparently duly executed on behalf of the company, were entitled to assume that everything necessary to its valid execution had been regularly and properly done. There is a distinction between what directors have no power to do at all and what they have power to do provided certain conditions are complied with, and, whilst it is held that

companies are not bound by acts of the former class, it is held that they may be bound by acts of the latter class in favour of all persons dealing with them *bonâ fide* without notice of irregularities of which they may be guilty: *Lindley on Companies*, 6th ed., p. 213. The instrument on its face appears to be proper and regular to effectuate the purpose for which it was agreed to be given, and there is nothing to shew that the defendants were aware of the so-called irregularities preceding its execution.

Upon this branch of the case the learned trial Judge's conclusion should be reversed, and the instrument upheld.

Then comes the question upon which the learned trial Judge held in the defendants' favour. The mortgage having been made within three months next preceding the commencement of the winding-up, there is a presumption that it was made with intent to defraud the company's creditors. But the presumption is not a conclusive or irrebuttable presumption. It places upon persons, whether creditors or not, to whom a mortgage is given within the prescribed limit of time, the onus of shewing the absence of intent to defraud the creditors of the company. So far as the sections of the Winding-up Act relating to voluntary and fraudulent conveyances and other dealings are concerned, the law remains as enunciated in the case of *Lawson v. McGeoch* (1893), 20 A.R. 464. It was open to the defendants to overcome the statutory presumption of intent, and, as the authorities have settled, the intent of the debtor alone to defraud is not sufficient. It must be the conjoint intent of debtor and creditor; and the intent to prefer is in general overcome when it is shewn that the giving of the mortgage or other security was not the mere voluntary act of the debtor.

The law in this respect is illustrated by the cases of *McCrae v. White* (1883), 9 S.C.R. 22; *Long v. Hancock* (1885), 12 S.C.R. 532; *Molsons Bank v. Halter* (1890), 18 S.C.R. 88; and *Kirby v. Rathbun Co.*, 32 O.R. 9. Decisions since the amendments to the Ontario Assignments and Preferences Act must be read in view of the difference in the enactments. See *Webster v. Crickmore* (1898), 25 A.R. 97.

The learned trial Judge was of opinion, upon the evidence, that the defendants had sufficiently discharged the onus of rebutting the presumption of intent to defraud. This conclusion is greatly strengthened by the further evidence. The result of the whole

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testimony is that the mortgage was the outcome of repeated demands made upon the company by the defendants—who were dissatisfied with the state of the account—accompanied on more than one occasion by a threat of proceedings which were held in abeyance in consequence of the promise on behalf of the company that a mortgage would be given. There is some conflict between the testimony of the plaintiff and the defendants' manager at North Bay with regard to a conversation between them after the company was put into liquidation. The plaintiff deposed that at an interview between them the manager stated that the defendants did not want the mortgage; that it was thrust upon them by the company of its own accord—or words to that effect. The manager denied having had any conversation with the plaintiff concerning the mortgage. The testimony of Mr. C. Eaton, who gave his evidence with great fairness and candour, while going to prove the fact of a conversation, makes it evident that the statement attributed to the manager by the plaintiff that the mortgage was thrust upon the defendants, or given of the company's own accord, was not made. All that can be said is that very likely the manager expressed indifference as to whether or not the defendants were entitled to retain the mortgage as a security. However, the discrepancies between the testimony of these gentlemen are not sufficient to displace the positive evidence of the manager and Mr. McGaughey, as to the circumstances leading to and attending the giving of the security.

The attack upon the mortgage fails, and the appeal should be allowed and the action dismissed, but the circumstances were such as to invite inquiry, and we may properly say that it is not a case in which any of the costs of the litigation should be awarded to either party.

MEREDITH, J.A.:—The learned Judge erred, I think, in holding that the transaction in question came within the provisions of secs. 73 and 74 of the Ontario Companies Act. Those sections relate to borrowing money and issuing bonds, debentures, or other securities, and the creating and issuing of preference stock, and the conversion of preference shares into common, etc., in certain companies.

Section 78 of the Act gives power to the directors to mortgage

the company's property to secure—among other things—"any liability of the corporation."

At the trial it was admitted that the debt, which the mortgage was given to secure, was a valid liability of the company. The mortgage having been given for a liability of the company, sec. 78 applies, and there is nothing in sec. 73 or 74 affecting it. If the provisions of secs. 73 and 74 had not been observed in borrowing the money, which created the liability, there might be no liability; but no such case was made: a valid liability was admitted, that is an admission, in effect, that, if secs. 73 and 74 applied to such borrowing, they had been complied with.

The by-law, properly interpreted, does not purport to have been passed under sec. 73; but, if it had, the right which the directors had, not that which they may have thought, or asserted, that they had, ought to prevail.

The case is not one within sec. 94 of the Winding-up Act; there was valuable consideration, the existing liability, and "pressure."

Since the foregoing opinion was written, further evidence has been adduced, which not only confirms the finding that the mortgage was not a voluntary conveyance and security, but proves that it was the outcome of very considerable pressure and that a further consideration, a new "line of credit," was given for it.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Appeal allowed and action dismissed, without costs.

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BARNETT V. GRAND TRUNK R.W. Co.

Railway—Collision—Injury to Person on Train—Trespasser—Negligence—Arrangement between Railway Companies—Use of Yard and Tracks.

The Pere Marquette Railway Company, under an arrangement with the defendants, used the yard and station ground of the defendants at London. A Pere Marquette train came into the defendants' station at London, discharged its passengers, and was proceeding backwards to its destination for the night, when the plaintiff jumped on board, intending to ride a short distance towards his home. He stood upon the rear platform of a car, and was in that position when a collision took place between the train he was on and a car of the defendants, upon a "lead" of the defendants, on which the train was lawfully proceeding, by reason of the negligence of the defendants, whereby the plaintiff was injured:—

Held, MEREDITH, J.A., dissenting, that the plaintiff, whatever his position as regards the Pere Marquette Railway Company, whether trespasser, occupant at sufferance, or licensee, was not a trespasser upon the rights of the defendants; for the time being the defendants had no right of occupation or passage upon the place where the collision occurred; and the defendants were liable to the plaintiff in damages for the injuries caused by their negligence.

Judgment of a Divisional Court, 20 O.L.R. 390, affirmed.

APPEAL by the defendants from the judgment of a Divisional Court, 20 O.L.R. 390, setting aside the judgment for the defendants entered by MEREDITH, C.J.C.P., upon the findings of the jury, and directing judgment to be entered for the plaintiff for \$6,000, the damages assessed by the jury, acting upon a consent, given by the parties at the trial, to the Court determining any point necessary for the determination of the rights of the parties not covered by the questions submitted.

The plaintiff, being upon a coach of the Pere Marquette Railway Company, not as a paying passenger, but getting a gratuitous lift, was injured by reason of a collision with a car of the defendants, caused by the negligence of the defendants.

The Divisional Court held that the plaintiff was a licensee, and entitled to recover damages against the defendants.

May 11 and 12. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., and SUTHERLAND, J.

Wallace Nesbitt, K.C., and *D. L. McCarthy*, K.C., for the defendants. The jury having found that the plaintiff was on the steps of the Pere Marquette Railway Company's car without the permission of that company, and without the knowledge of the

train crew, and was therefore a trespasser, the defendants owed him no duty and were not responsible for the accident which happened to him; and the Divisional Court should not have interfered with the findings of the jury: *Graham v. Toronto Grey and Bruce R.W. Co.* (1874), 23 C.P. 541.

J. F. Faulds and *P. H. Bartlett*, for the plaintiff. He was upon the train of the Pere Marquette Railway Company with the knowledge and consent of the brakeman in charge of the train, and was therefore a licensee; and the defendants were liable for gross negligence in shunting into the Pere Marquette train: *Harris v. Perry*, [1903] 2 K.B. 219; *Wilton v. Middlesex R.R. Co.* (1871), 107 Mass. 108; *Philadelphia and Reading R.R. Co. v. Derby* (1852), 14 How. (S.C.U.S.) 468; *Sievert v. Brookfield* (1905), 35 S.C.R. 494; *Nightingale v. Union Colliery Co.* (1903-4), 35 S.C.R. 65, 67, 9 B.C.R. 453, and cases therein referred to. The plaintiff could not have been a trespasser as against the defendants, because he was neither upon their train nor upon their property: *The Bernina* (1887), 12 P.D. 58, 83; *Greenland v. Chaplin* (1850), 5 Ex. 243. If he was a trespasser on the train of the Pere Marquette Railway Company, he was an honest and mistaken trespasser, and the defendants are liable to him: Beven on Negligence, Can. ed., vol. 2, pp. 952, 953; Shearman and Redfield on the Law of Negligence, 5th ed., vol. 1, p. 98, and cases there referred to. The place where the collision occurred was upon the public highway, and in such case the plaintiff could not be a trespasser as against the defendants: *Grand Trunk R.W. Co. v. McKay* (1903), 34 S.C.R. 81; Shearman and Redfield on the Law of Negligence, 5th ed., vol. 2, p. 485C. He could not have been a trespasser on the property of the defendants, as the defendants were not in exclusive possession of the property where the accident occurred: *Cooper v. Crabtree* (1882), 20 Ch.D. 589; Encyc. of the Laws of England, vol. 12, pp. 279-281. The by-laws and regulations of the defendants were inadmissible in evidence because the plaintiff was not upon the train of the defendants, and the rules and regulations of the Pere Marquette Railway Company were inadmissible because they had not been approved by the Governor in council.

Nesbitt, in reply. The case of *Harris v. Perry*, *supra*, referred to in the judgment of the Divisional Court, does not deal with trespass, but with a trap, and is therefore not applicable here,

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and at any rate in that case Rowell, the superintendent, who consented, had authority to consent. See judgment of Collins, M.R., in that case, at p. 225. The defendants owed no duty to the plaintiff, who was a trespasser, and they had no reason to expect that he would be where he was when the accident occurred: *Lowery v. Walker*, [1910] 1 K.B. 173, at pp. 178-179; *Nightingale v. Union Colliery Co.*, *supra*.

October 13. Moss, C.J.O.:—Upon consideration I am of opinion that the judgment of the Divisional Court should be sustained. While I do not desire to be understood as not agreeing with any of the grounds upon which that judgment proceeds, as set forth in the opinion of the Chancellor of Ontario, I am satisfied to rest my conclusion on the ground indicated by the Chancellor in dealing with the argument of the plaintiff's counsel, that, even if the plaintiff was a trespasser, the defendants were liable.

Whatever may have been the true position of the plaintiff, as far as the Pere Marquette Railway Company was concerned, he was not at the time a trespasser upon the rights of the defendants. For the time being the defendants had no right of occupation or passage upon the place at which the accident occurred. The act of suddenly and improperly projecting their cars upon the line over which the Pere Marquette Railway Company's train was lawfully proceeding, was due to the gross negligence of the defendants' servants and agents, and this was found to be the cause of the accident. Under these circumstances, I am unable to see how it is any answer to the plaintiff's claim to say that, because it may be that, if the Pere Marquette company or its employees had known of his presence, they would have objected and perhaps taken steps to remove him, the defendants are not responsible for the injury they inflicted upon him.

It does not appear that, as between the defendants and the Pere Marquette company, there was any obligation upon the latter not to permit any but their own employees to be upon their train. They might, as the evidence shews their trainmen were in the habit of doing, allow others besides their own employees to be upon the same train under similar circumstances. There was nothing to absolve the defendants from the duty of exercising due care to avoid collision with the Pere Marquette train.

Injury to any person then upon the train arising from a failure to observe the duty—gross negligence in fact—should, I think, be considered as within the consequences fairly resulting from the defendants' default.

I think the appeal should be dismissed with costs.

GARROW, J.A.:—The action was brought by the plaintiff to recover damages for injuries received by him in a collision at the city of London, Ontario, at about 10 o'clock p.m. on the 23rd August, 1909. At the time of his injury, the plaintiff was upon a car of the Pere Marquette Railway Company, with which a car of the defendants came into collision. It appears that the Pere Marquette company, under an arrangement with the defendants, used the yard and station ground of the defendants. The Pere Marquette train from Walkerville had just come in and discharged its passengers, and was about to proceed backwards to its destination for the night, when the plaintiff jumped on board, intending to ride a short distance towards his home, which lay near the track, and in the direction in which the train was about to proceed. He did not enter a car, but stood upon the rear platform, and was in that position when the collision took place.

At the trial, before the questions submitted to the jury had been answered, it was agreed by counsel that any additional questions necessary for the determination of the rights of the parties, not covered by the questions, might be dealt with by the Court.

The questions to and the answers by the jury are as follows:—

"Q. 1. Was the plaintiff at the time of the accident upon the train of the Pere Marquette Railway Company by the permission of the company? A. No.

"2. Was the plaintiff upon the platform by the permission of the Pere Marquette Railway Company? A. No.

"3. If you answer yes to questions one and two, upon what grounds do you so find? (No answer).

"4. At what sum do you assess the plaintiff's damages? A. Six thousand dollars (\$6,000)."

And to these findings should, under the consent, be added a finding by the learned trial Judge that upon the evidence the proper conclusion was that the collision was the result of gross negligence on the part of the defendants, within the meaning of

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that term as used in *Watson v. Northern R.W. Co.* (1864), 24 U.C.R. 98.

Upon these findings the learned Chief Justice dismissed the action, and in doing so said: "The jury have in effect found that the plaintiff was a trespasser upon the train of the Pere Marquette Railway. It follows from that, I think, that he was a trespasser upon the property of the Grand Trunk Railway. The defendants, therefore, owed no duty to him, unless it be a duty not wilfully or intentionally to injure him. That, I understand, to be the extend of the duty which they would owe to a trespasser. There is no pretence for saying that in this case there was any wilful injury done to the plaintiff. The result is, therefore, that his action must fail."

The judgment of the Divisional Court was delivered by the learned Chancellor, who held that the charge and the answers found by the jury left the matter imperfect, inasmuch as, although in the charge the learned Chief Justice had referred to the evidence that the plaintiff and others were in the habit, to the knowledge and with the consent of the train officials, of acting as the plaintiff did on the occasion in question, no question upon that branch of the subject was submitted. And, under the power of the Court to make further findings of fact, the learned Chancellor expressed the opinion that the evidence would justify a finding that the plaintiff was upon the car with the consent of these officials, and was therefore not a trespasser, but a licensee. The learned Chancellor was further of the opinion that, even if the proper conclusion of fact was that the plaintiff was a trespasser, the defendants were nevertheless liable, and that in either view the plaintiff was entitled to judgment for the damages found by the jury.

It would, perhaps, have been more satisfactory, as the learned Chancellor suggests, if the jury had been asked to find whether the plaintiff was upon the train with the knowledge and consent of the train officials, as they are called by the learned Chancellor, and as to the so-called practice—although I am not prepared to say that such knowledge and consent to occasional acts such as that of the plaintiff by servants of that class, contrary to their instructions and to their duty, would in itself have the effect of establishing a practice, or of in any other way affecting the company with liability, unless it could be inferred from the evidence that the

company, through its higher officials, had notice of what was going on. In *Harris v. Perry*, [1903] 2 K.B. 219, to which the learned Chancellor refers, Rowell, who, the jury found, consented, was in the position of superintendent. And in *Nightingale v. Union Colliery Co.*, 35 S.C.R. 65, the jury expressly found that the deceased and other persons had been in the habit of riding on the coal train in question to such an extent that Mr. Little, the superintendent of the defendants, in the proper discharge of his duty, must have known of the practice. See the case as reported in 9 B.C.R. 453.

Nor am I prepared to agree that, if the plaintiff was at the time of the collision a trespasser upon the property of the defendants, there being no evidence of wanton or wilful misconduct on the part of the defendants, the plaintiff could maintain the action. See *Lowery v. Walker*, [1909] 2 K.B. 433; *Murley v. Grove* (1882), 46 J.P. 360; *Illinois Central R.R. Co. v. Eicher* (1903), 202 Ill. 556; *Gunther v. New York Central R.R. Co.* (1903), 81 N.Y. App. Div. 606; *Lagerman v. New York Central R.R. Co.* (1900), 53 N.Y. App. Div. 283; *Nightingale v. Union Colliery Co.*, 35 S.C.R. 65.

But, in the view which I take, it is not, I think, necessary to go at greater length into these questions, because, in my opinion, the judgment of the Divisional Court can be sustained and should be affirmed upon another ground, referred to, but upon which there is, I think, no express finding one way or the other, in the judgment of the Divisional Court.

The conclusion expressed by the learned Chief Justice at the trial, in the judgment which I have set out, rests, it is clear, upon the view that, as the result of the finding of the jury that the plaintiff was not upon the train with the permission of the Pere Marquette Railway Company, it followed that he was a trespasser upon the defendants' property. This does not seem to me by any means to follow. The right of an owner to immunity from liability (except in special circumstances) to a trespasser rests upon his possession or right of immediate possession, and, speaking generally, to do as he pleases upon his own land. But, if he parts with the right of possession, even temporarily, to another, he cannot, while the lawful possession of the person claiming under him continues, maintain trespass against one who without right enters on the land.

Under such circumstances, it is not the owner's legal right

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which is invaded, but that of the person in actual possession, who alone can maintain an action for the trespass, unless, of course, the reversion is affected.

The exact nature of the right or title of the Pere Marquette Railway Company to occupy and use the lead upon which the train was at the time of the collision, is not very clearly shewn. But, at all events, it is proved and not disputed that for a number of years that company, under some arrangement with the defendants, had used this lead as a means of access to the station, and to that company's yards at Colborne street. And while so actually using the lead, the Pere Marquette Company would necessarily be, as against even the defendants, in exclusive possession.

Under these circumstances, it seems to me, with deference, to be impossible to hold that the plaintiff was a trespasser upon the property of the defendants. He may not have been entitled to be upon the train, but that is a matter entirely between him and the Pere Marquette Railway Company, and, whatever his position as to that company, whether trespasser, occupant at sufferance, or licensee, it affords, in my opinion, no defence to this action. Nor would it, in my opinion, be a good defence, under the circumstances, that the plaintiff was upon the platform of the car contrary to the defendants' regulations, and to the Railway Act, as was contended before us by counsel for the defendants.

For these reasons, I would dismiss the appeal with costs.

MACLAREN, J.A., and SUTHERLAND, J., concurred.

MEREDITH, J.A. (dissenting):—I cannot but think that, if this case had been submitted to many counsel before action brought, the plaintiff would have been advised, invariably, that no action lay.

He was, upon his own statement of the facts, a mere trespasser; to whom, as it plainly seems to me, the defendants, without any knowledge of his being upon the railway, or any reason for thinking that he might be there, owed no duty.

To hold that he was not a mere trespasser is to reverse the finding of the jury, based upon the preponderant evidence; and to say that, though a mere trespasser, the defendants owed to him the same duty as they owed to those who were not trespassers,

but were rightfully upon the Pere Marquette train, is to say something which I cannot help thinking contrary to law and reason.

The argument that, because the train was rightfully where it was when run into, and the defendants guilty of negligence in running into it, they must be equally guilty towards all who happened to be upon the train, seemed to me plainly to be erroneous. Generally any person may perform his work as he pleases. Actionable negligence is involved only when he negligently infringes upon the right of another. There would have been no actionable negligence on the defendants' part if the train had no right to be where it was when run into.

There is and always has been a difference between the case of a mere trespasser and one who is acting within his legal rights at the time of his injury. One may not knowingly injure a mere trespasser; one may not, knowing that he is in the way, run down another, merely because that other has no right to be in the way; but does one owe any duty to another who has no right to be at the place where he is injured, and whose presence is, not unreasonably, not known? see *Grand Trunk R.W. Co. v. Anderson* (1898), 28 S.C.R. 541.

How can it be said reasonably that the plaintiff was not a mere trespasser, liable to eviction, and also to the penalties provided for in the 425th section of the Railway Act? Assuming that the brakesman even gave him leave to be where he was when injured, what authority, actual or ostensible, had he for doing so? Even if the train were carrying passengers, it need hardly be said that a brakesman has no such authority or apparent authority. But the train was not carrying passengers; it had come to the end of its journey, and was merely being backed down into the yard for the night, after discharging all its passengers, as the plaintiff well knew.

Apart from all this, there is no evidence of any assent on the part of the brakesman to the plaintiff being on the car; there is nothing to indicate that, if he really saw him at all, he knew that he was not one of the railway company's servants, having that right in the performance of his duties, as, for instance, one of the car-sweepers who went to work upon the train when the passengers were discharged.

My finding upon the evidence would be in accord with the

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brakesman's evidence; it is improbable that he would give leave to a stranger to ride upon the train, disobeying his orders and risking dismissal; and that evidence is in a measure corroborated by the other trainman. Neither seems to have known of any one being there until they heard the plaintiff's groans.

The defendants were not trespassers, whatever effect it would have upon this case had they in fact been but trespassers. They had a right to use the track; it was theirs, but were guilty of negligence in obstructing it at a time when the Pere Marquette train had "the right of way" over it.

Besides these considerations, what reasonable man could conscientiously say that the plaintiff was not guilty of negligence—obvious gross negligence—without which he would not have been injured as he was? If he had the rights of a passenger, he had also the obligations of a passenger. Could anything be more imprudent than standing at the foot of the steps of the back platform of a discharged train being backed down through a congested city railway yard on a dark night? It was in truth courting disaster, if a collision should occur; the plainest kind of a case of contributory negligence, upon the plaintiff's own testimony,

To say that he was justified in incurring this great risk because a brakesman did not tell him that he ought not to, seems to me to be very unreasonable. The man knew the risk, every man in his senses must have known it; is he to be absolved from the consequences of his own action in taking it because some one else did not prevent him? Besides this, two facts (which, to say the least of them, have not been proved) must be taken for granted to support the argument: (1) that the brakesman had authority from the defendants to permit the passenger to take such risks, in the face of their notices to the contrary; and (2) that he in fact did permit it.

If the case had been tried before me, I would have had no hesitation in directing that judgment be entered dismissing the action, on the plaintiff's own shewing.

But, after a full, fair, and careful trial, the jury have found in the defendants' favour, not only upon all the material issues in the case, but upon all the issues that each of the parties, at the trial, thought material; and a verdict, once so found, surely ought to stand, though it happened to be in favour of a corporation, and against a plaintiff whose injuries cannot but win our pity and enlist our sympathies.

It has been said that to grant a new trial in such a case is one of the greatest injustices that can be done to the parties; but to reverse the verdict must be a greater injustice, if that reversal be unwarranted in fact and in law.

The reversal, instead of a new trial, is based upon a consent of the parties given at the trial thus: Q.—by the Judge—“Supposing there is some point necessary for the determination of the rights of the parties that is not covered by the questions submitted, are you content the Courts should determine that?” A.—By counsel for both parties—“Yes.” But no one has said, and no one can reasonably say, that any point necessary for the determination of the rights of the parties is not covered by the questions submitted to the jury: they are obviously broad enough for that, as the trial Judge stated, and as every one concerned at the trial knew; but the Divisional Court seems to have had a suspicion that the jury might not have so understood them; and to have considered that the jury “were imperfectly charged.” So that there is no basis for the judgment directed to be entered in the plaintiff’s favour; there was no jurisdiction—by consent or otherwise—to do more than grant a new trial; and to that extent, at least, it seems to me to be obvious that this appeal should succeed.

But what sort of suspicion or doubt can there be after a perusal of the whole charge? My own idea has always been, and added experience only confirms it, that a jury, having heard the whole trial of a case such as this, and charged as this jury was, is less likely to overlook, or fail to understand, either the facts or the law, than is a court of appeal, dealing only with “the dead body of the evidence,” and a very imperfect reproduction of the trial in all respects.

How can it be possible that the jury could have thought that the acts of all the servants of the company were withdrawn from their consideration, when the whole case, the whole trial, and the whole charge, deals with such acts only? But, in addition to this, the very subject was raised at the trial, and counsel for the plaintiff satisfied by the observation of the trial Judge, in effect, that the third question covered the whole ground of acts of the servants of the company. To what could the questions point but to acts and conduct of the trainmen? There was no evidence, nor allegation, of any other acts on the part of the company.

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Nor can I see how any honest, intelligent juror could come to any other conclusion than that reached by the jury; there was, indeed, no reasonable evidence of the company's assent to that which the plaintiff was doing. Do railway companies permit any person, who wants to, to travel free upon their trains? Do they permit them to travel at all upon a train which has discharged its passengers and is being backed into the yard for the night? Are they likely to take the risk of paying thousands of dollars in damages without any sort of consideration; but, on the contrary, an encouragement to persons to do that which is neither fair nor honest and is dangerous to limb and life? To liken the case to one of allowing passengers, or even the public, to pass over a way, seems to me to be absurd.

So too in regard to the trainmen. As I have said before, why would they, in breach of their duty and in dishonesty to their employers, thus endanger their situations? Whilst on the question of authority, as well as on the question whether the brakesman knew the plaintiff was not one having a right to be upon the train, there was no evidence in the plaintiff's favour.

I can, therefore, find no reason for interfering with the verdict.

In regard to the new point raised now, in this Court—since the argument—for the first time, and upon which this Court is about to support the judgment in the plaintiff's favour, I feel bound to express my ignorance of any principle upon which it can be supported. It seems to me to be entirely erroneous to say that an owner of land, who has given another a right of way over it, has no action of trespass against a mere trespasser upon the land, if he commit the trespass at a time when the right of way is being rightly exercised by those who have it. Can it be that a trespasser on the land of A and B ceases to be a trespasser as to A by forcibly entering, and against B's will remaining on, a carriage of B which is rightfully being driven over the land? Remembering that the railway yard in question was the defendants', and that the Pere Marquette train was exercising a right of way through it, the proposition that the plaintiff, though a trespasser there as to the Pere Marquette Railway, was not a trespasser as to the defendants, is to me a startling one; and one from which I feel bound to express my unqualified dissent.

On the contrary, would not the Pere Marquette company, as

well as the plaintiff, be trespassers, if, as against the defendants, he had no right to be there—the train not having at the time the right to carry passengers—and if they had knowingly brought him there?

Such cases as *Harrison v. Duke of Rutland*, [1893] 1 Q.B. 142, *Hickman v. Maisey*, [1900] 1 Q.B. 752, *The Queen v. Pratt* (1855), 24 L.J.N.S.M.C. 113, and *Goodtitle v. Alker and Elmes* (1757), 1 Burr. 133, seem to me to be quite in point and conclusive against the proposition. If the persons who were held to be trespassers in those cases had adopted the expedient of entering, against the will of the owners, carriages or carts lawfully using the highway, and thus carrying out their purposes, can it be that the additional wrong would absolve them? And that would be just this case.

The suggestion that, because the accident may have happened upon a highway, the plaintiff may be considered rightfully where he was when injured, though there without the knowledge and against the will of the railway companies, proves, to my mind, only the straits to which the plaintiff is driven for any sort of a foundation for his claim. He was not exercising, or pretending to exercise, any right of passage over the highway; if he had been exercising it, he would have been run down by the Pere Marquette train, which, for all that is proved, was rightly exercising its right of passage over the highway, and that company would not be answerable for his injury. There is no sort of evidence that either railway company was wrongly using the highway at the time of the accident.

The authorities relied upon in the plaintiff's behalf are so inapplicable to his case that I shall not take up time with them further than to point out that in the case mainly relied upon—*Harris v. Perry*, [1903] 2 K.B. 219—the person who was alleged to have given the invitation had authority to give it, and in fact did give it; in this case neither authority nor invitation is proved; indeed both are disproved.

In my opinion, the appeal should be allowed, and the action dismissed; but, as the other members of the Court are of the opposite opinion, the appeal must be dismissed.

Appeal dismissed with costs, MEREDITH, J.A., dissenting.

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[IN THE COURT OF APPEAL.]

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FEDERAL LIFE ASSURANCE CO. v. SIDDALL.

Appeal—Right of Appeal to Court of Appeal—Amount in Controversy—Judicature Act, sec. 76 (1) (b)—Mortgage Action—Costs—Motion to Quash Appeal—Practice—Judicature Act, sec. 51.

Where the respondent seeks to invoke the power of the Court of Appeal under sec. 51 of the Judicature Act, the proper practice is to move the Court to quash the appeal at the earliest moment after it has been lodged. Upon the motion coming on to be heard, the Court may direct the motion to stand for argument along with the appeal. But it is equally proper, and sometimes more convenient and less expensive to the parties, to dispose of it when brought on pursuant to the notice. And where, before the time for entering the appeal for hearing at the September sittings of the Court had elapsed, *i.e.*, on the 10th August, the respondents served notice of motion to quash, returnable on the first day of the sittings, the Court heard and granted the motion; MEREDITH, J.A., dissenting.

International Wrecking Co. v. Lobb (1887), 12 P.R. 207, followed.

Per MEREDITH, J.A., that, as the appellant had failed to set his proposed appeal down for hearing, there was no appeal to quash; and that, as sec. 51 does not provide for a motion to quash, the Court has no power to create a practice providing for such a motion.

The appeal was from an order of a Divisional Court, and it was quashed upon the ground that the sum in controversy was less than the sum or value of \$1,000, exclusive of costs: Judicature Act, sec. 76 (1) (b). And *held, per curiam*, that the word "costs" in that section means the costs incurred in the litigation; and, although the costs of a mortgage action stand on a different footing, speaking generally, from the costs of other actions, the costs taxed to the mortgagees by the Master, and included in his report in an action for foreclosure, were to be excluded in ascertaining the amount in controversy upon an appeal from an order varying that report.

MOTION by the plaintiffs to quash the appeal of the defendant Robert H. Siddall from an order of a Divisional Court, 1 O.W.N. 796.

The order of the Divisional Court varied an order made by a Judge dismissing an appeal from a Master's report, in an action upon a mortgage for foreclosure, in regard to the amount found due to the plaintiffs, the mortgagees, by the Master.

September 19. The motion was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. G. Farmer, for the plaintiffs. The matter in controversy in the appeal does not amount to the sum or value of \$1,000, exclusive of costs, within the meaning of sec. 76(1) (b) of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2.*

*76. (1) An appeal shall lie to the Court of Appeal from the judgment, order or decision of a Divisional Court of the High Court in the following cases, that is to say: . . . (b) Where the matter in controversy in the proposed appeal is of the sum or value of \$1,000, exclusive of costs, or involves indirectly or otherwise that sum or value.

W. M. Douglas, K.C., for the defendant *Robert H. Siddall*. The amount involved in the appeal is over \$1,000, as the judgment is for \$1,107, exclusive of costs in the sense intended by the section. The difference does not include costs of the appeal, but costs in the Master's Chambers. The costs awarded by the Master are part of the claim; they are not costs in the ordinary sense, of judgment for so much and "costs." They are as much a part of the claim as interest would be. The judgment is for \$1,107 exclusive of costs of the Divisional Court. See *Canadian Railway Accident Insurance Co. v. McNevin* (1902), 32 S.C.R. 194. There should be leave to appeal in any case.

Farmer, in reply. The costs here are costs within the meaning of the section. The defendant cannot appeal here without leave, and no special circumstances entitling him to such relief have been shewn: *Re Molphy* (1896), 17 P.R. 247.

October 13. Moss, C.J.O.:—When a respondent seeks to invoke the power of the Court under sec. 51 of the Judicature Act,* the proper practice is to move the Court to quash the appeal at the earliest moment after it has been lodged, as was done in the case of *International Wrecking Co. v. Lobb* (1887), 12 P.R. 207, and other cases. This with a view to saving costs in the event of the motion succeeding.

Upon the motion coming on to be heard, the Court may, as it did in the case cited, direct the motion to stand for argument along with the appeal. But it is equally proper, and sometimes more convenient and less expensive to the parties, to dispose of it when brought on pursuant to the notice. The same practice is observed by the Supreme Court of Canada under a provision similar in terms to sec. 51. See *Cameron's Canada Supreme Court Practice*, p. 227. And with regard to the practice in Privy Council appeals, it is stated in *Safford & Wheeler's Privy Council Practice*, p. 724, that "if an appeal is incompetent, the respondent should move on petition and not wait till the hearing."

Before the time for entering the appeal for hearing at the present sittings had elapsed, *i.e.*, on the 10th August, the respondents

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*R.S.O. 1897, ch. 51, sec. 51: The Court of Appeal shall have power to quash proceedings in cases brought before it, in which appeal does not lie, or where such proceedings are taken against good faith.

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served notice of motion to quash, returnable on the first day of the sittings.

The respondents' point is that the matter in controversy in the appeal does not amount to the sum or value of \$1,000, exclusive of costs, within the meaning of sec. 76(1) (b) of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2.

It cannot be questioned that the word "costs" as employed in sec. 76(1) (b) means the costs incurred in the litigation.

A distinction is drawn between the amount awarded by the judgment and the costs of obtaining the judgment. In ascertaining whether a judgment is appealable under this provision, the costs must be excluded. According to the Judicial Committee, the same result follows even where the words "exclusive of costs," or equivalent words, are not used. See *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270, at p. 274. See also cases referred to by the Chief Justice of Canada in *Labrosse v. Langlois* (1908), 41 S.C.R. 43, at p. 51.

Reference to the papers before the Divisional Court, when pronouncing the order from which it is now sought to appeal, shews clearly that the amount in controversy in the proposed appeal is less than the sum or value of \$1,000, if the costs are excluded. Including the sum of \$390.74 taxed costs, the amount adjudged against the defendant was \$1,102.07, and, adding subsequent interest, the amount payable by the defendant, on the day fixed for payment, came to \$1,191.32. Deducting the costs, there remains the sum of \$800.58. The costs were incurred in establishing before the Master a special claim under a special order of reference as to it made after the Master had made his first report. And with regard to these costs the Divisional Court say there is no reason for interfering with their disposition below; the mortgagees acted in good faith, and, though they failed as to some items, were entitled to the general costs. See 1 O.W.N. at p. 799.

They form no part of the costs allowed to the plaintiffs in taking the accounts under the original judgment. None of the matters dealt with by the first report are now in question.

The defendant is, therefore, not entitled to appeal as of course to this Court.

In the alternative, it is asked on his behalf that leave to appeal be now given. But no special circumstances entitling the de-

fendant to such relief have been shewn. The defendant has already had the benefit of the opinion of three tribunals.

The motion should be allowed and the appeal quashed with costs.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—If I had my way, no order would be made on this application to “quash” an appeal, in this case, for the simple reason that there is now really no appeal subsisting in it, and there never may be; so that what we are asked to do is not only to jump a ditch before we reach it, but also a ditch which may never be reached; a proceeding which even the prospect of a very short sittings of the Court cannot warrant. The defendant failed to set his appeal down for hearing as the Rules require, and it is, therefore, so far as his own power over it is concerned, as effectually “out of Court” as if an appeal had never been commenced. He may, of course, apply to the Court to be reinstated; but he might also apply for leave to begin an appeal if none had ever been commenced. We are not to assume that either application would be granted; less ought we to act as if the application had been made and granted.

The statute provides that the Court may quash proceedings in a case in which an appeal does not lie, or where such proceedings are taken against good faith; it does not provide for a motion to quash; and the Court has no power to create a practice providing for such a motion; it is bound by the Consolidated Rules of Practice, under which it must proceed by analogy to cases expressly provided for, in cases for which there is no express provision. Therefore, an adoption of the practice of the Supreme Court of Canada in such matters would be at least quite as much beyond the jurisdiction of this Court as this or any case could be without it. And I may add that that practice should receive careful consideration if it should ever be thought of introducing it into the Consolidated Rules. To me it seems a great hardship upon a respondent, who has done no wrong, that the onus of a substantive motion to quash should be imposed upon him, with the penalty (if he do move) of staying proceedings in the appeal while the motion is pending because of the wrong of the appellant in bringing an appeal in a case in

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which no appeal lies. I am not prepared to strain at a gnat of costs and swallow a camel of delay—delay which may possibly deprive a respondent of all the fruits of his judgment. Surely the usual rule should prevail—no stay unless otherwise ordered. And I may add that, frequently, the question of jurisdiction is one of greater difficulty than any other involved in the case, and requires for it an understanding of the facts—and therefore an appeal-book—quite as much as the other questions involved in the appeal.

The usual, indeed almost the invariable, practice, in this Court, has been to raise the objection to the right of appeal in the reasons against the appeal, and to argue it after the appeal has been set down for hearing; and generally, for convenience and the saving of expense, to argue the other questions in the appeal at the same time; so general indeed has been that practice that I am unable to call to mind another case in this Court, since I have been a member of it, in which that practice was not followed, because plainly the best. This case is an exception; but an exception should not make, or call for, a new rule.

But I am not to have my way; the motion must be dealt with on its merits now.

It is quite true that costs of a mortgage action stand upon quite a different footing from costs of other actions, speaking generally. The mortgagee is generally entitled to his costs: see Con. Rule 1130; and that right has been put upon very high grounds: see *Cotterell v. Stratton* (1872), L.R. 8 Ch. 295. It is true also that a Master's report has been held to have something of a magical effect in changing the character of debts found due in it: *Federal Life Assurance Co. v. Stinson* (1906), 13 O.L.R. 127, and *S.C.*, *sub nom. Scott v. Swanson* (1907), 39 S.C.R. 229; but there is nothing in the rule as to such costs, or in that case, which compels one to hold that costs are not costs, even after they have been taxed in a Master's office, and included in a Master's report in a mortgage action.

Exclusive of such costs, \$1,000 is not in controversy in this case, and therefore an appeal does not lie.

Before dealing with any question as to granting leave to appeal, in this particular case, I would prefer that an application should be made, in a proper manner, for leave to appeal; and when so

made I would find it difficult to consider the question without all the information which an appeal-book would afford; unless, indeed, the application should fail because of the plaintiff's voluntary delay in carrying on the appeal which he brought.

The application must be allowed.

Appeal quashed with costs.

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[RIDDELL, J.]

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Limitation of Actions—R.S.O. 1897, ch. 133, secs. 4, 5 (1), 8—Adverse Possession—Dispossession—Discontinuance of Possession—Exclusion of True Owner—Occupation of Surface—Maintenance of Roof Projecting over Land in Dispute—Entries by True Owner—Acquisition of Title, Subject to Easements.

Under the Real Property Limitation Act, R.S.O. 1897, ch. 133, secs. 4, 5 (1), and 8, the ten years limited by sec. 4 begin when the true owner is dispossessed or discontinues possession; the possession to be relied upon by the claimant must be such as involves the exclusion of the true owner; the occupant of the surface of the soil may obtain a title to that surface, while the true owner retains an easement therein, and, subject to such easement, the statutory title is *usque ad calum*; and the right of a person to have his eaves or roof project over another's land is an easement.

Therefore, where the defendant claimed title by possession to a strip of land one foot wide, lying between the plaintiff's house and front fence and the true boundary line separating the adjoining lots of the plaintiff and defendant fronting on a city street, and it was not disputed that the defendant had acquired a title to the strip by the statute unless the acts of the plaintiff in maintaining the roof of her house projecting over the strip, or her entries upon the strip, prevented such title accruing:—

Held, that the maintaining of the roof was not such a circumstance as to prevent the defendant's exclusive possession, and that all the acts done by the plaintiff, in person or by agent, in entering upon the strip, were attributable to the easement of access, support, etc.; and it was declared that the defendant had acquired the fee in the strip, subject to the two easements of maintenance of the roof and of the right of access and support for painting, etc., the side of the plaintiff's house and fence next to the strip.

Marshall v. Taylor, [1895] 1 Ch. 641, followed.

THIS was an action for damages for trespass to land and for an injunction. The defendant counterclaimed for a declaration of his title to the strip of land in dispute.

October 10. The action was tried before RIDDELL, J., without a jury, at Toronto.

J. Haverson, K.C., for the plaintiff.

G. W. Mason, for the defendant.

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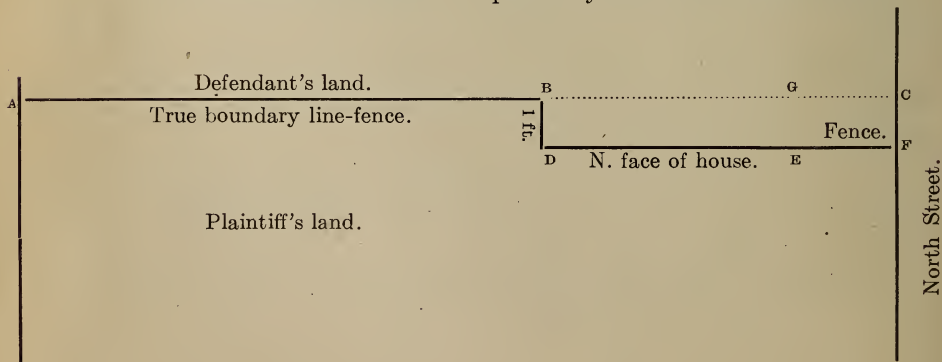
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October 14. RIDDELL, J.:—The plaintiff is, and since the month of November, 1876, has continuously been, the owner of a parcel of land on the west side of North street, Toronto. The defendant is the owner of a parcel of land to the north thereof. Along the north line of the plaintiff's lot runs a fence from the rear, east toward North street, and to a point about 40 feet west of the street. There begins a house on the plaintiff's lot, whose north face runs parallel to the dividing line between the properties, one foot south thereof, but the projecting roof at the north extends out to and perpendicularly over the dividing line. The house was built before 1876, and has been maintained in this position continuously since. It comes to within about 10 feet of the west line of North street, and a short fence in a line with the north face of the house runs east to the street. It is plain that the builder of the house (it is said, the owner at that time of the plaintiff's land) did not desire to trespass upon his neighbour, but built the house as near to the northern limit of his own land as possible consistently with the whole of his roof being within his limits.

Before the house was built, the fence now at the rear and on the true line ran to the street on the same line. Mr. Blight is quite in error in supposing that the fence was on a line with the north face of the house. No rights by way of prescription, etc., were acquired before the building of the house; nor were there even acts of trespass upon the property now the plaintiff's.

The defendant, in 1909, built a concrete walk from the street along this strip to the north of the plaintiff's house, and claimed and continues to claim this foot strip as his own, *i.e.*, from the street to the west side of the plaintiff's house. That is the issue to be tried in this action. A plan may make the matter clearer.



A B is the present fence, which, until the building of the house, extended in the same line to C and on the true line. B D is the jog of 1 foot from the true line to the north face of the house, the roof of the house projecting one foot so that the vertical from the edge of the roof will intersect the earth at the dotted line B G; D E is the north face of the house, and E F the front fence in a line with this north face. The distance from G to E or from C to F is, of course, 1 foot. The land in dispute is the rectangle B D F C.

Ever since 1876 the plaintiff has from time to time had the north face of her house and the front fence E F attended to by painters, etc., and she has herself gone upon the strip in question as owner and considering it her own. She asked no permission so to do from the defendant or his predecessor in title, but acted as of right, not imagining that any one was claiming the strip adversely to her. She at the same time, also without leave, walked upon the adjoining land of the defendant.

Admittedly she has and always since 1876 has had the paper title, and the only claim of the defendant must be under the statute. The defendant claims and proves that he and his predecessors kept the strip in question as part of their lawn for many years, sometimes planting flowers close up to the north wall of the house. It is not disputed that the defendant would have a title to the strip by the statute unless the acts of the plaintiff in leaving and maintaining the roof, or her entries, prevent such title accruing.

The statute relied upon is R.S.O. 1897, ch. 133, secs. 4, 8; with these must be read sec. 5 (1), which shews that the ten years limited by sec. 4 begin when the plaintiff or her predecessor in title "has been dispossessed or has discontinued" the possession, admittedly and, as I have found, proved to have been, once hers or theirs.

"Adverse possession, for the purpose of giving title under the Statute of Limitations, means and implies, that the true owner is out of possession, and that some third person (the adverse possessor) is in possession." Banning on Limitation of Actions, 3rd ed. (1906), p. 84, citing *Smith v. Lloyd* (1854), 9 Ex. 562; *Seddon v. Smith* (1877), 36 L.T.N.S. 168.

"The difference between dispossession and the discontinuance of possession might be expressed in this way—the one is where a person comes in and drives out the others from possession, the other case is where a person in possession goes out and is followed

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into possession by other persons:" Fry, J., in *Rains v. Buxton* (1880), 14 Ch.D. 537, at pp. 539, 540.

The law as to what is and what is not a dispossession, etc., is laid down in *Leigh v. Jack* (1879), 5 Ex.D. 264: "Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a 'dispossession' of him, and are not evidence of 'discontinuance of possession' by him within the meaning of" the statute. In that case L. had conveyed to the defendant in 1854 a plot of land on the south side of an intended street, and the defendant had built a factory thereon; in 1857 L. conveyed to certain persons a plot of land on the north side of the intended street, which in 1872 vested in the defendant. From 1854 the defendant had placed upon the intended street materials to be used in his factory, so as to block it for all but foot-passengers, and in 1865 enclosed a portion of it—in 1872 he fenced in the ends of the intended street. The plaintiff, who was the successor in title of L., began his action in 1876 to recover the site of the intended street. Cockburn, C.J., says: "The plaintiff and her predecessors in title did not intend to abandon the ownership of the soil If a man does not use his land, either by himself or by some person claiming through him, he does not necessarily discontinue possession of it." Bramwell, L.J., at p. 273, lays down the principle broadly: "Acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it."

This case has been considered in *Marshall v. Taylor*, [1895] 1 Ch. 641 (C.A.). Lord Halsbury says (p. 645): "In that case the person who set up a possession inconsistent with the rights of the person to whom the property originally belonged had incumbered that intended road with various articles of his trade, but in no sense was there any exclusive possession There was no exclusive possession sufficient to make the possession change so as to put it on him and dispossess the real owner of the land." It would seem to me that this is the real ground of the decision in *Leigh v. Jack*, and that that case is but a particular instance of the application of the rule that the posses-

sion to be relied upon by the claimant under the statute must be such as involves the exclusion of the true owner. If in *Leigh v. Jack*, the defendant had fenced in and cultivated the intended road, it cannot, I think, be questioned that he could have successfully pleaded the statute, no matter what the intended use might be.

The plaintiff contends that the maintaining of the roof was such a circumstance as to prevent this exclusive possession; and refers to the maxim "*Cujus est solum, ejus est usque ad cælum*" (Co. Litt. 4 (a)), the argument being that, if the defendant could be acquiring the fee in the soil, he would at the same time be acquiring the right to have the roof of the house removed; and at the end of ten years that right would become absolute. The defendant replies that this result does not follow—that all he acquired was subject to the right of the plaintiff to retain the roof.

It will be necessary to see how the authorities stand.

It seems clear that the title to land may be acquired by the claimant having exclusive possession of the surface, notwithstanding that the true owner has possession of some space between the surface and the centre of the earth. For example, in *Midland R.W. Co. v. Wright*, [1901] 1 Ch. 738, the defendant and his predecessors had kept exclusive possession of the surface of land above a railway tunnel, which tunnel was continuously occupied and used by the company. It was held by Byrne, J., that a statutory title had been acquired, "subject to the right of the plaintiffs to the tunnel and to so much of the underlying and superincumbent strata as is necessary for its due and proper enjoyment as and for a tunnel:" p. 744. This land not having been "superfluous land and therefore land which the railway company could not sell or dispose of," it may be doubtful whether this decision would be followed with us in the case of a railway company, in view of *Guthrie v. Canadian Pacific R.W. Co.* (1900), 27 A.R. 64, S.C., *sub nom. Canadian Pacific R.W.Co. v. Guthrie* (1901), 31 S.C.R. 155, and *Grand Trunk R.W. Co. v. Valliear* (1904), 7 O.L.R. 364. But I do not find the law questioned in respect of any point in England; and the case may well be of authority where the law is not complicated by the fact of a statutory body like a railway company being the owner. The case, moreover, decides that what the disseisor acquires by the statute is not the bare right to the surface, "that is, sufficient of the soil and of the

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air space above for the . . . purposes for which he has in fact occupied the surface," as argued (p. 740), but "all above and below . . . except that which is the property of another party"—as the head-note puts it, "*usque ad cælum*."

In *Marshall v. Taylor*, [1895] 1 Ch. 641, the Court of Appeal had to consider a similar question in an appeal from a decision of the Vice-Chancellor of Lancaster. The plaintiff, who for the purpose of the judgment was considered to have been the owner of a strip of land lying between his residence and that of the defendant, had (or his predecessor in title had), in 1868, laid down drain pipes along this strip, into which the drainage of both houses was allowed to run; the drain was then covered over, and from that time the defendant and his predecessors had used this strip as a part of the garden of the defendant's house—there was a hedge on the plaintiff's side of the strip, and the plaintiff continued from time to time to cut his hedge from the defendant's side, and on two occasions had opened the drain to clean it. The Vice-Chancellor, following *Leigh v. Jack*, held that the defendant had not made out a title by the statute; but this was reversed by the Court of Appeal, who held "that, subject to the right . . . for the joint occupation and user of the drain-pipes themselves for the purpose of carrying the drainage from both houses, the defendant is now entitled to the possession of this piece of land in dispute:" p. 646, *per* Lord Halsbury, L.C. Both Lindley, L.J., and A. L. Smith, L.J., thought that the plaintiff might have an easement—a right to go on the defendant's land to clip the hedge: pp. 648, 651. These decisions seem to be authority for the proposition that the occupant of the soil may acquire a title to the land, subject to an easement remaining in the owner. And the same appears to result from *Norton v. London and North Western R.W. Co.* (1879), 13 Ch. D. 268. There the railway company had made a ditch within their fence and thrown up a bank, whereon they planted a hedge: as the hedge grew the fence was allowed to decay, and in 1846 it was removed. The adjoining proprietor for twenty years used the strip and cultivated it as part of his field, the railway company not interfering except that their workmen went over it to trim the hedge. The Court of Appeal held that title had been acquired by the statute, and that the acts of the railway company at the most might amount to evidence of an easement required for the purpose of maintaining the hedge: p. 274.

I think these cases compel me to hold that the occupant of the surface of the soil may obtain a title to that surface while the true owner retains an easement therein, and that, subject to such easement, the statutory title is "*usque ad cælum*."

I am unable to see that the projecting roof of the plaintiff's house in the present case is any more effective in maintaining his possession in the soil or making less exclusive that of the defendant than the drain was in the case in [1895] 1 Ch.

That the right of a person to have his eaves or roof project over another's land is an easement is, of course, elementary, and the power of acquiring such an easement by the statute has been admitted since *Thomas v. Thomas* (1835), 2 Cr. M. & R. 34; *Harvey v. Walters* (1873), L.R. 8 C.P. 162; *Lemmon v. Webb*, [1894] 3 Ch. 1, at p. 18, *per* Kay, L.J.—"In the case of the house there is an occupation by A. of B.'s land to the extent of the encroachment, and this by lapse of time may grow into a right. . . ." In such a case the vertical column of air over so much of the building as overhangs the land of another, belongs not to him who owns the protrusion but to that other: *Corbett v. Hill* (1870), L.R. 9 Eq. 671.

I am, therefore, of the opinion that, unless the acts of entry, etc., of the plaintiff have prevented the possession of the defendant from being exclusive in the meaning attached to the word in consideration of cases under the statute, the defendant has made out his title, subject to the easement of the plaintiff to retain her roof, "without substantial variance in the mode of or extent of user or enjoyment of the easement, so as to throw a greater burthen on the servient tenement" (L.R. 8 C.P. at p. 166), and another easement which will be mentioned later.

In this regard the case of *Leigh v. Jack* is not of assistance, as there the only possession had by the claimant was such as did not interfere with foot-passengers, and foot-passengers are persons who would be expected to use the road if and when it was laid out as intended. *Norton's* case, 13 Ch. D. 268, is, however, much in point—there the railway company sent their servants to trim the hedge from time to time, and the Court held (p. 274): "It is impossible in our judgment to hold that the annual stepping over the hedge to clip and trim it, and the annual clipping and trimming thereof, was any retainer of actual possession, or any evidence that

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the land was not actually . . . given up." The Court goes on to say: "The hedge was undoubtedly the defendants' fence, and it was their statutory duty . . . to keep the same in proper repair . . . and their going upon his side of the fence for the purpose of performing their duty to him, and for no other purpose, cannot be held to be in any way a derogation of the proprietary and possessory rights of the adjoining proprietor and occupier." It would appear that the Court was influenced by the fact that the railway company were bound by statute to do as they did in clipping the hedge, and that to clip the hedge their men must go upon the disputed land. But no such complication is to be found in *Marshall v. Taylor*, [1895] 1 Ch. 641. There the plaintiff had no statutory or other duty to trim the hedge, but he "was in the habit of sending his agent into the other garden and clipping the hedge" (p. 645), although to get there he must go through the hedge or through the gate of the defendant (pp. 645, 646). It would seem that the Chancellor thought that the going through the gate, etc., was by permission of the defendant (p. 646); but Lindley, L.J., does not put his judgment on any such ground. He says (p. 648): "The defendant has been in possession to the exclusion of the plaintiff, and all the plaintiff has done is to clip this hedge." And A. L. Smith, L.J., says (p. 651): "He says he has not discontinued possession of this strip of land because year by year, without asking leave except to get in—and very likely without asking leave to get in—he has gone to the other side of his beech-hedge and trimmed it. Is that a continuing in possession of the four feet of land, or is it consistent with his simply having an easement over the defendant's land for the purpose of trimming the hedge?" And he comes to the conclusion that it is the latter. As to the act of the plaintiff in going upon the land and taking up the drain, the Lord Justice, at the same page, says: "He (the plaintiff) says that twice since 1868, when the drain-pipe was choked and overflowed . . . he went in and took up what was necessary for the purpose of cleaning this drain. . . . To what is that to be attributed? Is that to be attributed to a right he had of cleaning so as to have the sewage discharged down the drain, or is it an act of ownership which shews there had been no discontinuance of possession by the plaintiff during the statutory period? In my judgment those acts are applicable to the

former, and not to the continuance in possession of the soil during the statutory period."

It will be seen that the two classes of acts relied upon in this case of *Marshall v. Taylor* are distinguishable: (1) The going upon the soil and digging up the drain, which is an act the plaintiff had the absolute right to do from having the right to have the sewage discharged from the drain: *Finlinson v. Porter* (1875), L.R. 10 Q.B. 188; *Goodhart v. Hyett* (1883), 32 W.R. 165; and *cf. Newcomen v. Coulson* (1877), 5 Ch.D. 133. This is like the training of the railway hedges in the *Norton* case, in 13 Ch. D. 268, in which the railway company had the statutory duty to trim the hedge, which carried with it the right to make such entries as were necessary to perform this duty (see p. 274). The acts of the plaintiff in the present case are not like these and do not come within this category. There was no statutory duty to paint, etc., the fence or house; and, had the land been the defendant's, there was no right to enter upon the lands of the defendant to paint, etc., or to inspect or supervise the painting, etc. The second class is different: (2) Acts which, if the land were the land of another, would evidence an easement reserved when giving up the possession of the soil. Such are the acts of the plaintiff in *Marshall v. Taylor* in having his agent go to the other side of the hedge, without asking leave, for the purpose of and actually trimming it. The Court throughout treats this as though the plaintiff himself had acted instead of his agent (head-note, pp. 642, 645, 646, 648, 650, 651). Such acts as these are attributed to an easement (pp. 648, 651).

All the acts done in the present case by the plaintiff in person or by agents in entering upon the land, etc., could be attributed to the easement of access, support, etc., necessary or proper in painting, etc., the north side of the house and fence, etc. "Entry is not equivalent to possession:" per Fry, J., in *Edwick v. Hawkes* (1881), 18 Ch.D. 199, at p. 203.

So, too, that the right of projecting the roof over the lands of another could be reserved, is shewn by the case of *Corbett v. Hill*, L.R. 9 Eq. 671.

Unless I am to disregard the *Marshall* case, I think I must hold that the defendant's possession has not been interfered with by the plaintiff, and that, subject to the right of retaining the

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roof, as already spoken of, and entry to paint, etc., the house and fence, the defendant has title to the strip of land.

This finding is not opposed to the case of *Solling v. Broughton*, [1893] A.C. 556. In that case, the interpretation placed upon the word "entry" in sec. 8 of the Act by Lord Campbell in *Randall v. Stevens* (1853), 2 E. & B. 641, 23 L.J.N.S.Q.B. 68, was approved—that is to say, "a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession." But the entries which were held effective in *Solling's* case were actual entries by the true owner, when the land was vacant and in the occupation of no one, and *animo possedendi*; and, consequently, they were, to my mind, wholly different from those of the plaintiff here.

I regret the result to which, as I think, the authorities force me; and give the judgment I do simply in deference to the authorities. In case the matter comes before an appellate Court, I would say that the plaintiff was transparently truthful, and every credit is to be given to her testimony—it may be that I have not drawn the proper conclusion from her evidence, but, with this finding as to the credit to be given to her, an appellate Court will be in as good a position as I am to draw the proper conclusion.

There will be a declaration that the defendant has acquired the fee in the strip of land in question, subject to the easements, (1) the maintenance of the roof, and (2) the right of entry and support, etc., for painting, etc., the north side of the house and front fence.

It is not a case for costs.

[DIVISIONAL COURT.]

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Costs—Summary Disposition—Master in Chambers—Jurisdiction—Consent of Parties—Appeal—"High Court or any Judge thereof"—Judicature Act, sec. 72—Con. Rule 767 (1)—Judge in Chambers—Order Staying Action—Disposition of Costs—Further Appeal—Discretion—Merits.

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On the 16th May, 1910, the plaintiff began this action, to compel the defendant to convey certain land and for general relief. The statement of claim was delivered on the 9th June, and the statement of defence on the 18th June, after which the defendant was examined for discovery. On the 26th August the solicitors for the defendant sent to the plaintiff's solicitor a conveyance of the property referred to. A conveyance of the property had been made by the defendant's testatrix to the plaintiff, but the making of the affidavit of execution had been, at the plaintiff's request, delayed, and the witness was absent in Europe when the action was begun. The witness returned in August and made the affidavit of execution, whereupon the conveyance was at once sent to the plaintiff's solicitor. Subsequently, on the 1st September, the plaintiff gave notice of a motion to be made before the Master in Chambers "for an order that judgment be entered for the plaintiff for the claims set out in the plaintiff's statement of claim, and for delivery of the papers therein mentioned, and for the costs of this action." The Master, upon this motion, made an order "that the motion herein made by the plaintiff is allowed, and the defendant is hereby ordered to pay to the above-named plaintiff the costs of this action." Upon appeal, an order was made by a Judge in Chambers rescinding the order of the Master, staying the action forever, and providing that there should be no costs to either party. Upon appeal by the plaintiff from that order:—

Held, by a Divisional Court, that the order of the Master in Chambers was not "an order made by the consent of parties," within the meaning of sec. 72 of the Judicature Act, which does not apply to an order made *in invitum* where jurisdiction is given by consent.

Semble, that, if the order had been one made by consent, there would have been no appeal from it, the Master in Chambers coming within the words "High Court or any Judge thereof," in sec. 72: *Re Justin, a Solicitor* (1898), 18 P.R. 125.

But it was immaterial whether the Master had or had not jurisdiction: he made an order not "as to costs only," and such an order is appealable under Con. Rule 767 (1), no other Rule or statute taking away the right of appeal; and, therefore, the appeal was properly heard by the Judge in Chambers.

Held, also, that the substantive order made by the Judge (that is, staying the action forever) not being complained of, and being manifestly right, the Court would not interfere with the disposition of the costs made by that order; and, if the merits were considered, the plaintiff, at least, could not complain of the order.

MOTION by the plaintiff for an order directing judgment to be entered for the plaintiff for the claims set out in the plaintiff's statement of claim, and for delivery of the papers therein mentioned, and for the costs of the action, or for such other or further order as should seem just, upon the admissions made in the defendant's pleading and in the examination of the defendant for discovery.

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The action was brought by Moses Davis against Ellen Winn, executrix of the will of Victoria Davis, deceased, to compel the defendant, as such executrix, to convey to the plaintiff a share in the estate of his father; Victoria Davis, deceased, having been executrix of the father's will.

The action was begun on the 16th May, 1910. The defendant was examined for discovery on the 30th June, 1910. On the 26th August, 1910, the defendant's solicitors wrote to the plaintiff's solicitor enclosing a deed executed by Victoria Davis in favour of the plaintiff, which had been retained by the defendant's solicitors, in the circumstances set out in the judgment of RIDDELL, J. The letter was as follows: "As requested, we now enclose you the deed from Mrs. Davis to the plaintiff. We do not think this is a case for costs in favour of the plaintiff. If you think otherwise, we will be prepared to argue the matter before the Master."

The motion was launched by the plaintiff on the 1st September, 1910.

September 10. The motion was heard by the Master in Chambers.

John MacGregor, for the plaintiff.

W. E. Raney, K.C., for the defendant.

September 14. THE MASTER IN CHAMBERS:—Motion for an order for payment by the defendant to the plaintiff of the costs of the action, the defendant having complied with the claim of the plaintiff.

It is, no doubt, most regrettable that this action should have been necessary. But I cannot say that the plaintiff was to blame in asking for a deed which has since been given him. Had the defendant consulted her adviser as soon as the demand was made on her, early in May, it is probable that the matter could have been arranged. The reason given by the defendant for her delay is not adequate as an answer to the present motion. Apparently she thought that her duty as executrix of the mother of the parties entitled her to consult the other members of the family before carrying out her mother's agreement.

She can apply, on passing her accounts, to be allowed what she will now be ordered to pay—which (if the defendant consents) I fix at \$50, payable in two weeks.

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The order of the Master, as drawn up and issued, was "that the motion herein made by the plaintiff be allowed, and the defendant is hereby ordered to pay to the above-named plaintiff the costs of this action within one week after taxation thereof."

The defendant appealed from this order.

September 20. The appeal was heard by MIDDLETON, J., in Chambers.

The same counsel appeared.

September 26. MIDDLETON, J.:—This matter came before the Master in Chambers upon a motion for judgment under Con. Rule 616, but appears to have been dealt with as a motion to determine the incidence of the costs of the action—it being said that the further prosecution of the action for any other purpose was unnecessary by reason of the execution of certain conveyances.

Before me there was much discussion as to the understanding upon which the motion was heard, out of which only this could be ascertained with certainty. Each party insists upon his strict rights. The defendant is willing that I should finally deal with the whole matter. The plaintiff refuses to assent to this, preferring to stand upon the Master's order and the consent, as he says, of the defendant to the Master dealing with all questions, the effect of such consent being to make the Master's decision final.

Under these circumstances, I admitted on this motion the defendant's solicitors' letter of the 26th August.

The motion was "for an order directing judgment to be entered for the plaintiff for the claims set out in the plaintiff's statement of claim and for the delivery of the papers therein mentioned, and for the costs of the action," and was based upon the pleadings, the examination, and an affidavit of one Dickenson. Regarded as a motion under this Rule, such an affidavit cannot be read, but in the result this is not material.

The defendant filed affidavits explaining the situation from her standpoint, and, after argument, the Master delivered a judg-

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ment taking the view that the defendant's conduct had necessitated the action, and directing her to pay the costs. The formal order is not confined to this, but in addition orders "that the motion herein made by the plaintiff be allowed." This provision was probably inserted *per incuriam*.

There is much room for doubting whether the Master in Chambers has jurisdiction to deal with a motion under this Rule, which amounts to the hearing and determining of the cause. Admissions may be made in pleadings and on examinations which raise matters of the greatest importance and difficulty, and the parties are entitled to have the case disposed of before a forum from which there is an unfettered right of appeal. The Master was, therefore, right in dealing with this as a motion made to determine costs only, and I think that the parties so treated it, and, if the defendant's consent was necessary, the letter put in before me may be regarded as a consent.

It seems to me, after the most careful perusal of the papers, that the Master has erred in holding that the defendant should pay costs.

The late Victoria Davis entered into an agreement of the 5th April, 1906, by which the plaintiff was to receive a conveyance of certain lands as representing his share in his father's estate. A conveyance was drawn up and signed by her, and it was, at the request of the parties, left in the possession of Mr. Mills for both parties, it not being desired to register it, or in fact to deliver it, because of executions in the sheriff's hands against the plaintiff.

When this action was brought, the plaintiff had forgotten this deed, or at any rate had not told his solicitor of it, and had demanded a deed from the defendant, which was admittedly improper, in that it contained personal covenants on the part of the defendant.

Under the circumstances, the plaintiff cannot receive costs, and I have hesitated a good deal before determining that he should not pay costs. There are, however, circumstances which indicate that this is the proper result.

Where there is so much litigation about nothing, it is hard to apportion the blame, and perhaps the fact that each party will have a bill to pay may be salutary.

The appeal will be allowed, and, in lieu of the Master's order,

will be a determination that, it being admitted that there is no question for adjudication between the parties except the question of costs, the action is forever stayed, and it is not deemed proper to make any order concerning the costs of this action or of this appeal.

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The plaintiff appealed from the order of MIDDLETON, J.

October 6. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

John MacGregor, for the plaintiff. Under sec. 72 of the Judicature Act* no appeal lies from the decision of the Master in Chambers on the question of costs: *Re Justin, a Solicitor* (1898), 18 P.R. 125. The learned Judge from whose decision this appeal is taken must have overlooked *Knickerbocker Co. v. Ratz* (1894), 16 P.R. 191, in which the final judgment of the Court of Appeal, delivered by Osler, J.A., decided that the Master had jurisdiction to dispose of costs on such an application as this. The learned Judge has apparently followed the judgment of Meredith, J., in that case, 16 P.R. 30, 38, which was overruled by the Court of Appeal. As to the plaintiff's right to costs in an action of this kind, see *Cooper v. Whittingham* (1880), 15 Ch. D. 501.

W. E. Raney, K.C., for the defendant. The plaintiff's motion was made under Con. Rule 616, and was not founded on any consent or agreement between the parties. His motion should have been made under Con. Rule 1130, and I refer to cases under that Rule cited in *Holmsted & Langton*, at pp. 1342, 1343, especially *Hunter v. Town of Strathroy* (1898), 18 P.R. 127, and *Dicks v. Yates* (1881), 18 Ch. D. 76, at p. 84. [RIDDELL, J., referred to *Eastwood v. Henderson* (1897), 17 P.R. 578.] I contend that the plaintiff had no cause of action and was not entitled to costs.

MacGregor, in reply, argued that the Master in Chambers had full power to deal with the costs, which was the real matter in dispute, and that, under sec. 72 of the Judicature Act, there was no appeal from his decision, except by his leave, which had not been obtained.

* 72.—No order made by the High Court or any Judge thereof by the consent of parties . . . shall be subject to any appeal, except by leave of the Court or Judge making such order.

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October 18. The judgment of the Court was delivered by RIDDELL, J.:—The plaintiff issued his writ on the 16th May, 1910, following it by a statement of claim on the 9th June, 1910, setting out that by his father's will one Victoria Davis became executrix, and that the heirs of the deceased father made an agreement amongst themselves and with Victoria Davis by which all the estate of the deceased was to be conveyed to Victoria Davis and she was to collect the rents for four years expiring on the 5th April, 1910; that, after the expiration of the four years, Victoria Davis was to convey to him a certain named portion of the property; that he prepared a conveyance of this property and tendered it to the defendant, who had theretofore become executrix of Victoria Davis, but the defendant refused to convey. He asked that the defendant might (as such executrix) be ordered to convey, and for general relief.

The defendant, on the 18th June, filed her statement of defence, saying that she never disputed the plaintiff's right to a conveyance, desiring only reasonable delay to satisfy herself as to the plaintiff's right, but that Victoria Davis had left her affairs in great confusion, and that the defendant, who was not a business woman, was doing her best to administer the estate, and there had been no undue delay; that, before the action was begun, she had discovered a conveyance from Victoria Davis to the plaintiff, but that the witness had not made the affidavit of execution, and was then absent in Europe, being expected to return about the 1st August, and as soon as he came home the affidavit would be made and the conveyance would be delivered to the plaintiff, or, if he preferred, he could have the deed in its present condition. The defendant was then examined for discovery, and said that she saw Victoria Davis sign the deed to the plaintiff, but says: "It was my idea that I should not hand over that deed until the other sisters said whether it should be done or not—that was my reason." We were told by her counsel that she was actually in correspondence with one of the sisters to find out her views.

The solicitors for the defendant had, upon receiving the statement of claim, protested against the proceedings, and, saying that Mr. Mills would know all about all the arrangements, asked that matters should stand until his return—this was not acceded to; but an answer was given that the solicitor had instructions to press

the claim, and that the solicitor for the defendant had better put in a statement of defence or send over the deed executed by the defendant.

On the 26th August, the solicitors for the defendant sent the deed which had been signed by Victoria Davis, with the affidavit of execution properly made by Mr. Mills (the witness) to the plaintiff's solicitor, and in their letter said: "We do not think this is a case for costs in favour of the plaintiff. If you think otherwise, we will be prepared to argue the matter before the Master."

This, of course, contemplated "an application for disposal of costs of action on motion in Chambers," as referred to in *Holmested & Langton's Judicature Act*, p. 1342. Such a proceeding is not a motion for judgment or a trial in any sense, and is not intended to dispose of anything but the costs in a case in which the object of an action has been obtained. On such an application it is open for the defendant to claim that the plaintiff should pay the costs. Instead of pursuing this practice, the plaintiff applied to the Master on notice "for an order that judgment be entered for the plaintiff for the claims set out in the plaintiff's statement of claim, and for delivery of the papers therein mentioned, and for the costs of this action," etc.; the material to be used being stated to be "the affidavit of . . . the . . . plaintiff and the exhibits . . . with the affidavit of H. D., together with the pleadings and examination of the defendant . . . and the other proceedings in this action."

The Master in Chambers made an order "that the motion herein made by the plaintiff is allowed, and the defendant is hereby ordered to pay to the above-named plaintiff the costs of this action within one week of taxation thereof." It is said by my brother Middleton, in the Court below, that the provision other than that for costs, was probably inserted *per incuriam*. Looking at the reasons for judgment given by the Master in Chambers, this suggestion seems well founded; but an appellate Court has nothing to do with the reasons given for a judgment complained of—it is the formal judgment and not the reasons from which the appeal is taken. Persons taking out an order must see that it truly represents the opinion of the Judge or Master.

An appeal was taken before Mr. Justice Middleton, who made

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an order rescinding the order of the Master in Chambers, and, in lieu of that order, stayed the action forever and made no order as to costs.

The plaintiff now appeals.

The plaintiff first contends that no appeal lies from the judgment of the Master in Chambers, relying upon sec. 72 of the Ontario Judicature Act. A Divisional Court in *Re Justin, a Solicitor* (1898), 18 P.R. 125, decided that a local Judge was within the words "High Court or any Judge thereof;" and we are bound by that decision. Had it not been for that decision, I should have thought that the statutory words should be given their strict meaning, and that consequently a local Judge is not a judicial officer whose decisions were intended to be governed by the section. Con. Rule 6 (a) does not assist, as that Rule is applicable in interpreting the Rules, and even in the Rules "a Judge of the High Court" does not include a Local Judge or the Master in Chambers. I see no reason why the Master in Chambers should not be within the wording of sec. 72, if a Local Judge is; and we should follow the decision if it applies to the present case.

The order of the Master in Chambers is not "an order made by the consent of parties." Section 72 does not apply to an order made *in invitum* where jurisdiction is given by consent, even if the letter of the defendant's solicitors of the 26th August could be read as giving such consent; and, with much respect, I do not think it can. That letter, in my view, clearly referred to an application to dispose of the costs only, under the practice I have already spoken of, and not an application for any other relief. *Payne v. Caughell* (1897), 24 A.R. 556, may be looked at on what is a consent order, although indeed there the consent given to found jurisdiction in the Divisional Court expressly reserved the right of appeal.

It is unnecessary to consider whether such a Rule as 767 (2) would be effective as against sec. 72 of the statute; as no conflict will be found between them.

Nor is the order one "as to costs only" so as to read: "It is ordered that the motion herein made by the plaintiff is allowed, that is to say, the defendant is hereby ordered to pay . . . the costs. . . ." The order has the same effect (assuming jurisdiction in the Master) as an

indorsement by a trial Judge on the record: "I direct judgment to be entered for the plaintiff for the relief claimed in the statement of claim, and order the defendant to pay the costs." Turning to the notice of motion to find what the plaintiff's motion was, we find it was "for the claim set out in the plaintiff's statement of claim, and for delivery of the papers therein mentioned," etc.

The effect of the order would be to compel the defendant to convey to the plaintiff property of which he had already a conveyance from her testatrix, which would be obviously improper.

The application seems to have been made under Con. Rule 616; and, in my view, it is immaterial whether the Master in Chambers had or had not jurisdiction. He made an order not "as to costs only," and such an order is appealable under Con. Rule 767 (1),* unless some other Rule or some statute take away this right. No such Rule or statute exists; and I am of opinion that the appeal was properly heard by my brother Middleton.

It has already been pointed out that the order of the Master in Chambers was wrong; and it is plain beyond controversy that the substantive order made by the learned Judge is the right one—and it is not complained of. As to costs, it is not the practice of an appellate Court to interfere with the costs awarded by the Court appealed from, unless the order or judgment is set aside or is varied in some other respect.

Irrespective, however, of that almost universal rule, I am of opinion that the plaintiff, at least, cannot complain of the order as to costs. Upon the appeal before my learned brother, and before us, it appears that Mr. Mills drew up an agreement between Victoria Davis and other members of the family, including the plaintiff and defendant—that this was executed by the parties concerned—that Mr. Mills then drew up and had executed a deed from Victoria Davis to the plaintiff of No. 77 Leslie street, with a frontage of 22 ft. by a depth of 100 ft.—that both Victoria Davis and the plaintiff instructed Mr. Mills not to deliver or register the deed, but to keep it in his vault till after the death of Victoria Davis, one reason being that there was an execution in the sheriff's hands

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* 767.—(1) A person affected by a judgment, order or decision of the Master in Chambers . . . may appeal therefrom to a Judge of the High Court in Chambers.

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against the plaintiff which would attach—that in March, 1910, Mr. Mills shewed the plaintiff the agreement and deed both executed by Victoria Davis and witnessed by Mr. Mills, and reminded him of the reasons why the deed had not been delivered—that Mr. Mills saw the plaintiff twice during March, and at length the plaintiff told Mills that he would not accept the deed for 22 ft., but must have an additional strip of land to the north of 77 Leslie street, with a frontage of 8 or 10 ft.—that Mr. Mills told him that the defendant had not the power to give him the additional land, and the plaintiff replied that he would have the whole frontage or nothing—that the plaintiff never made any demand for that deed, but continued to claim from the defendant personally 32 ft. frontage—that the solicitor for the plaintiff on the 8th May sent over to the defendant for execution a deed of No. 77 Leslie street, with a frontage of 22 ft., containing, however, a personal covenant for quiet possession, etc., but did not communicate with Mr. Mills or his firm—that in the letter of the 5th May, enclosing the deed for signature, the plaintiff's solicitor gave the defendant till the 9th May to execute and deliver the deed or he would take proceedings, etc., and that he did issue a writ on the 16th May.

Under these circumstances, it is perfectly plain that the plaintiff had got all he bargained for from Victoria Davis, *i.e.*, a deed from her, that the omission to make the affidavit of execution was at his instance, and that any relief he could be entitled to is given by the Registry Act, R.S.O. 1897, ch. 136, secs. 47, 50, unless, indeed, the defendant forbade Mr. Mills to give up the deed, in which case the claim would not be for the execution by the defendant of a new conveyance, but for the effective delivery of the old one.

Had the case gone to trial, I think it should have been dismissed with costs; and I think, therefore, that the plaintiff has no ground of complaint in respect of the disposition of the costs made by the order appealed from.

The appeal should be dismissed with costs.

[IN CHAMBERS.]

RE CLEMENT.

1910

Oct. 20.

Will—Devise of Land not Owned by Testator—Misdescription—Intention—Evidence—Absence of General Words—Land Actually Owned by Testator not Passing.

The powers of the Courts in giving effect to what they may see, upon the face of the will, was the real intention of the testator, are not unlimited. If the testator has devised land which he did not own, with nothing more in the will to assist, although there is little (or no) doubt that thereby he intended to devise some land he did own, the latter land will not pass, and a well defined rule of law stands in the way of receiving evidence that that lot was intended. But, if there are any words in the will which would be effective to dispose of the land actually owned by the testator if the wrong description were entirely omitted, the land passes, and the wrong description is but *falsa demonstratio*, which may be removed by evidence as a latent ambiguity.

Review of the cases in the Courts of this Province from *Doe Lowry v. Grant* (1849), 7 U.C.R. 125, to *Re Harkin* (1906), 7 O.W.R. 840.

In this case the testator, without using general words shewing an intention to devise all his lands, or any words of that kind, but evidently with the intention of devising land which he owned, specifically devised "the south-west quarter of lot No. 3 in the 4th concession of the township of N. D." He did not own the south-west quarter of that lot, but he did own the south half of the north half of the lot:—

Held, that he died intestate in respect of the south half of the north half.

MOTION by the widow of Daniel Clement for an order declaring the true construction of his will, and for payment out of Court of the applicant's share of the moneys paid in.

October 18. The motion was heard by RIDDELL, J., in Chambers.

Casey Wood, for the applicant.

F. W. Harcourt, K.C., Official Guardian, for the other parties interested.

October 20. RIDDELL, J.:—Daniel Clement died having made his will whereby he (1) appointed executors; (2) directed his debts, etc., to be paid; (3) "I direct that my wife, M. C., shall have the south-west quarter of lot No. 3 in the 4th concession of the township of North Dorchester, to have and to hold for and during the term of her natural life;" (4) "I further will and direct that after the death of my said wife the said south-west quarter of lot No. 3 in the 4th concession of North Dorchester shall be equally divided among my children, except my son John, who has been provided for, and I would suggest that my said son John be given first chance

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to buy the said land and then pay the others off. But in case such an arrangement cannot be effected, then my executors or the survivor or survivors of them shall sell the same and divide the proceeds equally among my children (John excepted) . . . ;”
 (5) a specific legacy of an organ.

As a fact the testator did not own the south-west quarter of lot No. 3 in the 4th concession or any part of it; but he did own the south half of the north half of the lot. The executors found it necessary to sell the land to pay debts, and, the purchaser objecting to the title, an order was made under the Vendors and Purchasers Act declaring that the executors had power to sell, but directing the concurrence of the Official Guardian to be obtained. The land was sold, and, after payment of debts, etc., there remains a sum of \$1,254, which has been paid into Court. The widow has executed a deed of election, electing to take as her distributive share one-third of the moneys in Court.

I am asked to construe the will and to make an order for payment out to the widow of her share of the moneys.

While it is well decided and beyond question in Ontario that if by a will a testator devise land by a description which exactly fits land which he owned, no evidence can be given that he meant to devise some other or a greater amount of land—*Lawrence v. Ketchum* (1878), 28 C.P. 406, (1879) 4 A.R. 92—the law is not quite so plain in cases in which the testator has no land exactly corresponding to the description, but has land whose description corresponds in part to the description in the devise.

There are two lines of cases in our Courts—and I do not need to go beyond our own Courts in the decision of this matter—in one line of cases it has been held that no extrinsic evidence can be given to explain and modify the devise, in the other such evidence has been received.

In the former list appear: *Summers v. Summers* (1882), 5 O.R. 110, a devise of lot 14, concession 10, in the township of A., where the testator had not at the time of his death owned lot 14, but had owned lot 21 in concession 10; *Hickey v. Stover* (1885), 11 O.R. 106, a devise of the south quarter of lot 20, concession 9, township of R., and of the east quarter of the same lot, whereas the testatrix had no other land than the south half of lot 20, concession 8, of the township of R.; *Re Bain and Leslie* (1894), 25

O.R. 136, devise of lot 28 in the 10th concession of B., the only land in this 10th concession owned by the testator being lot 29. *Hickey v. Stover*, 11 O.R. 106, I discuss in the other list by reason of the effect on *Re Shaver* (1884), 6 O.R. 312, also in the other list. *McFayden v. McFayden* (1896), 27 O.R. 598, will also be considered later.

In the latter list are:—

Doe Lowry v. Grant (1849), 7 U.C.R. 125, devise of the north half of lot 26 in concession 6 of H., the testator owning lot 22 in that concession. There the Court held (p. 128) that the will itself afforded clear proof that he did intend to devise distinctly all his lands, but by mistake he had misnamed one of the parcels. The will began: "Know ye that I, M. L., do bequeath all and every part of my real property situated in the township of H. . . . ;" and it was considered that this shewed that the testator had intended to deal with all his land in H.; and that the only way in which his devisees could get all the land in H. was by correcting the error. Even in this case the Chief Justice, Sir John B. Robinson, was "not without some doubt:" p. 129.

Re Shaver, 6 O.R. 312, devise of the south-west quarter of lot No. 5 in the second concession of W., containing 50 acres. The testator did not own any part of lot No. 5 except the south-east quarter, upon which both he and the devisee had resided for many years. The Chancellor thought that the devise might be read as "fifty acres of lot 5 in the 2nd concession of W.:" and held that the south-east quarter passed under the will. But in *Hickey v. Stover*, 11 O.R. 106, at p. 116, the Chancellor, in the Divisional Court, thought he had gone too far in the *Shaver* case; and that case is not now of authority.

In *Hickey v. Stover*, devise of the south quarter of lot 20, concession 9, township of R., being 50 acres, "to my son T. L. . . . and to my daughters V. B. and M. B. the east quarter of said lot, being 50 acres. . . ." The testatrix had no land other than the south half of lot 20 in concession 8 of that township. It was held that no part of this latter land passed.

In *Hickey v. Hickey* (1891), 20 O.R. 371, a devise of "my property known as lot No. 6, 2nd concession . . ." and one of "my property known as part of lot No. 8, 2nd concession . . ." were held effective on lot 6 in the 1st concession and lot 8 in the first concession respectively.

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In *Doyle v. Nagle* (1897), 24 A.R. 162, the testator devised thus: "I give devise and bequeath to my son James, his heirs and assigns forever, the south-westerly quarter of lot number 11, concession 4, in the said township of A." The testator had no title or interest in the south-west quarter of lot 11, concession 4, township of A., but owned the south-west quarter of lot 12 in concession 4 of that township. Falconbridge, J., held that the last-named lot passed under the will, and his decision was affirmed by the Court of Appeal. That decision was based, however, upon the previous clause of the will, which read thus: "The residue of my estate which shall not be required for such purposes, I give devise and bequeath as follows:"—then follows immediately the devise in question. The Court held that it sufficiently appeared from the will that the testator intended to dispose of the residue of the estate, and the latent ambiguity might be removed by evidence.

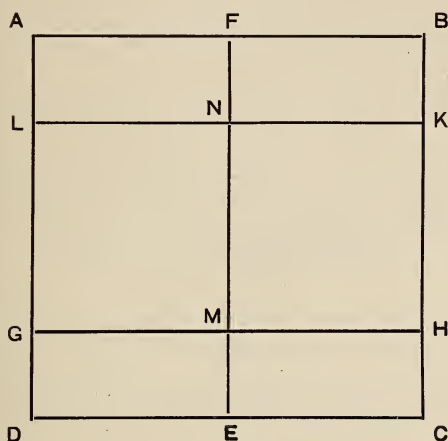
In *Re Harkin* (1906), 7 O.W.R. 840, the will began: "I devise . . . all my real and personal property of which I may die possessed in the manner following;" then, in the body of the will: "I hereby direct that the north-east quarter of lot No. 1 in the 4th concession of the township of S. and the north-east quarter of lot No. 12 in the 1st concession of the township of N. and also that part of lot No. 4 in the 7th concession of the said township of S. now owned by me. . . ." He owned the north-west quarter of lot 1 in the 4th concession of the township of S., but not the north-east quarter, and, if "east" were changed to "west" in the first description, the testator's language would have fitted his exact ownership. The Court, Boyd, C., held that the general introductory words, "all my real and personal estate of which I may die possessed," would suffice to let in evidence to correct the erroneous description.

There is another rather anomalous case, *McFayden v. McFayden*, 27 O.R. 598. The devise was in these terms: "I give devise and bequeath all my real and personal estate of which I may die possessed or interested in, in manner following, that is to say, I give and bequeath to my son H. A. the south fifty acres of lot number 21 in the 7th concession of the township of B., and one-half of my personal effects and property of whatsoever nature or kind. I give and bequeath to my son L. the north fifty acres of lot No. 21

in the 7th concession of the township of B. and the remaining half of my personal effects and property." The testator and his father before him had resided upon and owned the east half of this lot 21 (one hundred acres). The Court (Ferguson, J.) held that H. A. took under the will the south twenty-five acres of the east half of the lot, and L. the north twenty-five acres, and that the two took the middle fifty acres of the east half as tenants in common. A diagram may help to make the decision clear.

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A B C D is lot 21 (200 acres), of which the testator owned the east half (100 acres) B C E F: his will purported to dispose to H. A. of the south 50 acres (*i.e.*, the south quarter of the lot) C D G H, and to L. of the north 50 acres (*i.e.*, the north quarter of the lot) A L K B.

The Court decided that all that part of the south fifty acres owned by the testator (*i.e.*, the twenty-five acres C E M H) went to H. A. under the specific devise of land, and in the same way B K N F to L. As to the remaining fifty acres of the east half K H M N, that land passed under the clause "one-half my personal estate and effects" and the corresponding clause later in the will, by using the noun "property" without the modifying adjective "personal." It will be seen that this decision is not in point.

The principle underlying the decisions is, that the powers of the Courts in giving effect to what they may see, upon the face of the will, was the real intention of the testator, are not unlimited. "The duty of the Judges is to ascertain the meaning of the words

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of the will," and "not to speculate upon the meaning of the words used by the testator, which lets in the consideration what he intended to have done:" *West v. Lawday* (1865), *per* Lord Wensleydale, 11 H.L.C. 375, at p. 388.

If, then, the testator has devised land which he did not own, with nothing more in the will to assist, although there is little (or no) doubt that thereby he intended to devise some land he did own, the latter land will not pass, and "there is a clear and well defined rule of law which stands inexorably in the way of receiving evidence that that lot was intended:" *per* Burton, J.A., in *Doyle v. Nagle*, 24 A.R. 162, at p. 165.

But, if there are any words in the will which would be effective to dispose of the land actually owned by the testator if the wrong description were entirely omitted, the land passes, and the wrong description is but *falsa demonstratio*, which may be removed by evidence as a latent ambiguity.

Thus in *Doe Lowry v. Grant*, 7 U.C.R. 125, the first clause, "Know ye that I, M. L., do bequeath all and every part of my real property situated in the township of H.," would dispose of lot 22, even if it were not mentioned—that lot therefore passed under the will, though wrongly described as No. 26.

In *Doyle v. Nagle*, 24 A.R. 162, the words, "the residue of my estate . . . I give devise and bequeath . . .," would, of course, pass all the land in concession 4, and therefore the south-west quarter of lot 12 in that concession.

In *Re Harkin*, 7 O.W.R. 840, the same general words are found.

Nothing of the kind is found in the other cases cited; and the Court could not give effect to the intended devise.

In the present will it is perfectly manifest that the testator intended to devise land which he owned—the very precise disposition of it proves this beyond question—but it is not enough, in our law, for a testator to intend to devise; he must use words which are in law effective to make a devise.

There will be a declaration that the testator died intestate in respect of the land in question, and the order which should follow from that declaration will issue. If the parties cannot agree, I may be spoken to.

Costs of all parties out of the fund.

[See the next case.]

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Oct. 29.

Will—Devise of Land not Owned by Testator—Misdescription—Intention—Evidence—Preliminary General Words—Residuary Clause—Land Actually Owned by Testator Passing.

The testator, by his will, after revoking all previous testamentary dispositions, and directing payment of debts, proceeded thus: "I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say." Then followed two devises, and then the devise in question, to a grandson, of the south-west 50 acres of lot 1, concession 12 of L. A provision was then made for the support of the testator's wife, and a devise and bequest to three grandsons of the residue of the testator's estate. The testator did own 50 acres of lot 1 in the 12th concession of L., not the south-west fifty acres, but land described in the deed as "the south-westerly half of the north-westerly half, otherwise known as the north-west quarter;" and he never at any time owned any other part of lot 1:—

Held, that, as the testator had used, in the beginning of the will, words efficient to pass the land which he owned if the wrong description were deleted, the devise was effective and the wrong description, *falsa demonstratio*—the presence of the residuary clause making no difference.

The rule laid down in *Re Clement*, ante 121, applied to a different state of facts.

MOTION by the plaintiff for judgment on the pleadings in an action brought to obtain a declaration as to the true construction of the will of Leonard Smith, and as to whether certain land was thereby devised.

October 28. The motion was heard by RIDDELL, J., in the Weekly Court.

M. Grant, for the plaintiff.

F. W. Harcourt K.C., Official Guardian, for the defendants.

October 29. RIDDELL, J.:—The sole question in this case is the effect, if any, of a paragraph in the will of the late Leonard Smith.

The will, after revoking all previous testamentary dispositions and directing all debts, etc., to be paid, proceeds thus: "I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say." Then follows a devise to J. S. for life of 100 acres, S.E. $\frac{1}{2}$ of lot 2, con. 13 of the township of Lobo, with remainder to two grandsons named; then a devise to B. S. for life of the S.E. $\frac{1}{4}$ of lot 3, con. 12, Lobo, with remainder to G. S. Then follows the devise in question: "I give devise and bequeath to my grandson M. S., son of

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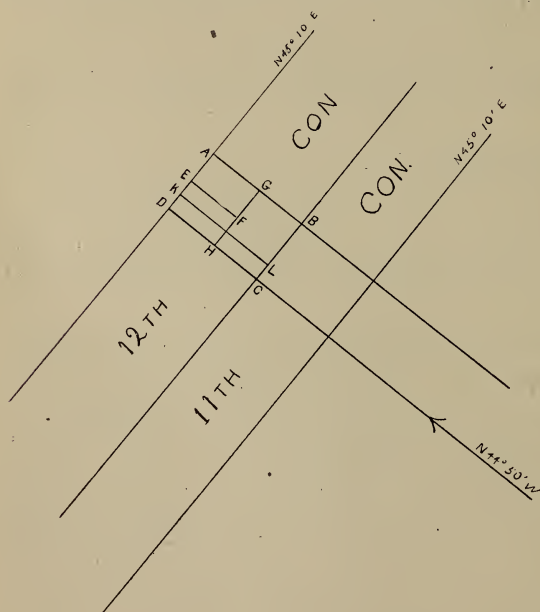
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J. S., the south-west 50 acres of lot one, concession 12, Lobo, absolutely, subject to the payment of \$40 per annum for the support of my wife during the term of her natural life." A provision is made for the support of the wife; then—"I give devise and bequeath to my three grandsons, G., M., and R., equally, all the remainder of my estate and personal property, to be sold and equally divided between them;" then a provision for the use by the wife for her life of the household furniture and household effects; and then—"All the residue of my estate, not hereinbefore disposed of, I give devise and bequeath unto my three grandsons before mentioned."

The testator did own 50 acres of lot 1 in the 12th concession of Lobo, but not the S.W. 50 acres—his deed runs "the south-westerly half of the north-westerly half, otherwise known as the north-west quarter . . . ;" and he never at any time owned any other part of lot 1. It is perfectly apparent that the testator intended to devise the 50 acres he did own, and the whole question is, has he succeeded in doing so?

The concession roads in Lobo do not run quite east and west, but N. 45° 10' E., *i.e.*, practically half way between N. and E., or N.E.



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On the plan, A B C D is lot 1 in the 12th concession, and A E F G the portion owned by the testator; this might with some propriety be called the N.W. $\frac{1}{4}$, but by no stretch of the use of language could it be called the S.W. $\frac{1}{4}$, which is D K L C.

In *Re Clement*, ante 121, I considered a matter not unlike the present, and came to the conclusion that the law in Ontario is that where a testator has used language efficient to pass the disputed land, if the wrong description were deleted, the devise is effective and the wrong description, *falsa demonstratio*.

Here the testator has used such words in the beginning of the will—"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say. . . ." Unless, then, the presence of the residuary clause (or clauses) makes a difference, the devise here is good. It does not appear that there was no residuary clause in *Doe Lowry v. Grant* (1849), 7 U.C.R. 125, *Hickey v. Hickey* (1891), 20 O.R. 371, or *Doyle v. Nagle* (1897), 24 A.R. 162; while it appears that there was not a residuary clause in *Re Harkin* (1906), 7 O.W.R. 840—and the defective devise was not helped by the absence of a residuary devise in *Re Bain and Leslie* (1894), 25 O.R. 136.

There can be no doubt that, if the attempted devise were incapable of taking effect, the land would fall into the residue (R.S.O. 1897, ch. 128, sec. 27), "unless a contrary intention appears by the will." Whatever interpretation be put upon the last clause, I think that this devise is not one "incapable of taking effect," for reasons which are set out in *Re Clement*. And I am unable, upon principle, to distinguish the case of a devise of this character followed by a residuary clause and one which is not. The rules laid down in *Re Clement* do not at all depend upon the leaning of the Courts against intestacy.

I am, therefore, of opinion that the devise is good to pass the land actually owned by the testator.

Costs of all parties out of the land devised—they may be declared a charge thereon.

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GROCERS' WHOLESALE CO. v. BOSTOCK.

Oct. 20.

Sale of Goods—Canned Fish—Express Warranty—Additional Implied Warranty—Fitness for Human Food—Breach—Damages—Third Parties—Claim against Cannors for Indemnity—Undertaking to Protect Vendor—Exclusion of Implied Warranty—Jurisdiction over Third Parties—Place of Contract—Place of Residence—Waiver by Unconditional Appearance—Con. Rule 173—Plea to Jurisdiction—Taking Part in Trial.

The plaintiffs, wholesale merchants in Ontario, bought from the defendant, a broker in British Columbia, a number of cases of canned fish, the defendant warranting that the goods were free from "blown, burst, dry, and leaks:"—

Held, upon the evidence, that this warranty had been broken, and the plaintiffs were entitled to damages for the breach.

The plaintiffs claimed further damages, as on an implied warranty that the goods were fit for human food, *i.e.*, reasonably fit for the purpose for which they were intended:—

Held, that, if a warranty was to be implied, it was not excluded by the express warranty; that the sale was of goods, not specific goods, supplied by a dealer and sold for a particular purpose, *i.e.*, for consumption as human food; and it made no difference that the immediate purchasers were not expected to consume the goods but the reasonably proximate purchaser was to consume them; that the defendant undertook to supply to the plaintiffs goods fit for human consumption, and the implied warranty arose; or the goods were bought by description, from which an implied warranty arose that they were of merchantable quality; and in either view the defendant was liable upon the implied warranty, and the plaintiffs were entitled to damages for its breach—the goods being, on the evidence, for the most part unfit for consumption.

Review of the authorities.

The defendant had procured the goods from a canning factory in British Columbia, the canning company, in writing, "undertaking to protect" the defendant "from all legitimate claims for blown, swell, dry, and leaks." The canning company were brought in by the defendant as third parties, and a claim for indemnity or relief over was made against them. They did not dispute liability for their express warranty, but denied liability upon any implied warranty:—

Held, that the defendant, being aware of all the risks of bad fish in the lot he was buying, and inspecting the goods with all the risks in his mind, and, after that inspection, being fully alive to all the risks, and thereupon asking for and receiving an express warranty or indemnity, could not set up any warranty to be implied.

It was contended by the canning company that a third party notice could not be served on a party out of the jurisdiction, except in circumstances in which, had he been a defendant in an action by the defendant, he could have been served, and that they were not in that position. The defendant contended that the contract of the canning company was to pay to the plaintiffs the amount of their legitimate claim, and this was a contract to be performed within Ontario:—

Held, that no action would lie to compel the canning company to pay the claim of the plaintiffs, and so bring the place of performance within Ontario; nor could it be considered that the plaintiffs were proper or necessary parties to an action by the defendant; the only action would be for a declaration of the rights of the defendant, and that would not have an Ontario *locus*.

Held, however, that the canning company, by appearing without protest or objection, had waived their right to object to the jurisdiction; since the passing of Con. Rule 173 any one who does not avail himself of that Rule

must be taken as waiving any right he may have to object; although the third parties, in their statement of defence, pleaded to the jurisdiction, that did not help them—their election was made on entering their appearance. *Semble*, also, that if, without pressure and voluntarily, a party attends the trial and takes part in it, he is not allowed to take advantage of his plea to the jurisdiction, even though that might otherwise be available. *Held*, also, that there was no evidence that the “residence” of the third parties was not in Ontario.

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ACTION for damages for breach of warranty upon the sale of goods by the defendant to the plaintiffs.

October 13. The action was tried before RIDDELL, J., without a jury, at Toronto.

D. L. McCarthy, K.C., and *J. G. Gauld*, K.C., for the plaintiffs.

J. W. Bain, K.C., and *M. Lockhart Gordon*, for the defendant.

L. F. Stephens, for the Canadian Canning Company, third parties.

October 20. RIDDELL, J.:—The plaintiffs are a wholesale firm carrying on business in Hamilton, Ontario, the defendant is a broker in Vancouver, British Columbia.

In September, 1906, the plaintiffs bought from the defendant 573 cases of salmon, 48 cans to the case. These were “do-overs,” and sold as such. It was explained that, when salmon is being canned, upon examination some cans are found defective and are laid aside—they are within 24 hours recooked and the cans made perfect as far as possible. The salmon, so recooked, is, I find on the evidence, wholesome and fit for human food, and is little inferior, as food, to that which is not recooked; but it is somewhat deficient in flavour and is softer than first-class salmon should be. This is what is called “do-overs,” and is sold for approximately \$1.50 per case, on the average, less than first-class salmon.

The goods, these “do-overs,” were guaranteed free from “blown, burst, dry, and leaks”—“blown” means with the can bulging (the usual cause being fermentation of some kind within); “burst,” can “blown” so far as to give way; “dry,” a can not containing the proper amount of fluid within; “leaks” is self-explanatory.

The salmon had been canned in the Star Cannery of the Canadian Canning Company Limited; and the defendant, on the 14th September, 1906, procured them from that company, with a writing which reads: “In reference to 573 do-overs talls this day delivered to you from our Star cannery, we hereby undertaking to protect

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you from all legitimate claims for blown, swell, dry, and leaks in respect of said lot of do-overs" (exhibit 4). "Swells" are not, I understand, to be differentiated from "blown," while "leaks" will include "bursts." The undertaking, therefore, substantially covered the defendant's warranty.

On the 14th September, 1906, or thereabouts, the salmon was sent on, accompanied by a sight draft for the price, \$2,234.70; and arrived at Hamilton some time in October. The plaintiffs had stipulated for the right to inspect the goods at Hamilton; and, when they arrived, the servant of the plaintiffs opened, of each of the three brands, four cases near the door, and out of each case took two cans, thus taking twenty-four cans in all. There was nothing except pressure of time to prevent him taking a sample from each case, but he supposed that in a business way the samples taken should shew fairly what the consignment was. Mr. Zealand, the plaintiffs' manager, himself examined eleven tins, and found ten all right and one rotten. "I find as a fact that in a lot of "do-overs" there may be expected to be up to ten per cent. bad—in extreme cases fifteen per cent., but no more—and that in a shipment of such goods, no more than from ten to fifteen per cent. should be defective in any way—all the rest should be good for human food. Zealand, finding only one in eleven defective (it would seem that the same result was found from all the twenty-four, but this was not made clearly to appear), took over the shipment and paid the draft.

The plaintiffs forthwith put the salmon on the market and sold 520 cases out of the lot; but almost immediately complaints were made, and the goods began to come back. The plaintiffs examined the goods, and found that a great part of the shipment was "drys, blowns," etc.; and that many cans which had no external signs of defect contained salmon unfit for human food, rotten, etc. "Drys" can be detected by tilting the can; but there were many cans not "drys," etc., which contained bad stuff.

The plaintiffs went into the matter with their customers, and have had to allow \$1,514.09 in settling the rightful claims made; and have still 140 cases of the shipment on hand.

The plaintiffs claim under two heads: (1) the written warranty; and (2) an implied warranty that the goods were fit for human food.

The defendant admits the warranty, but says that the salmon complied with the warranty, that the plaintiffs inspected the salmon and accepted it; at the trial he argued against any other warranty than that expressed.

The Canadian Canning Company had been originally parties defendants in the action; but the action is discontinued against them.

The defendant served a third party notice upon the Canadian Canning Company. This company moved to set the notice aside, and the Master in Chambers (3rd March, 1910) made an order dismissing the motion, ordering the company to file their defence in the third party proceedings, and "that this order is made without prejudice to the rights of the third parties, should they be advised to plead the jurisdiction of the Court." The company thereupon entered an unconditional appearance, and afterwards pleaded to the merits, and added "that as both . . . parties are residents in the Province of British Columbia, and the contracts in question arose and were to be fulfilled there, the said cause of action should be tried and disposed of in the Province of British Columbia, and is not within the jurisdiction of this Court."

The case came down for trial before me at the Toronto non-jury sittings. At the opening of the case, Mr. Stephens, for the third parties, raised the question of the jurisdiction of the Court, and I said I would find the facts irrespective of his plea; and that I would pass upon that afterwards.

Mr. Stephens himself asked a question of a witness, and had Mr. McCarthy ask another witness a question for him.

On the facts, it is quite plain that the warranty given by the defendant has been broken, and the plaintiffs are entitled to a reference to determine the damages. But the plaintiffs claim further damages as on an implied warranty that the goods were fit for human food, *i.e.*, reasonably fit for the purpose for which they were intended.

Bigge v. Parkinson (1862), 7 H. & N. 955, in Cam. Seacc., is authority for the proposition that an express warranty does not exclude the warranty implied by law that the goods should be reasonably fit for the purpose for which they were intended, in cases in which such a warranty is implied by law: *Mody v. Gregson*

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(1868), L.R. 4 Ex. 49; *Readhead v. Midland R.W. Co.* (1869), L.R. 4 Q.B. 379, at p. 386, in *Cam. Seacc.*

The quality of the fish could not be determined by examination. "Whether they are perfectly sound or perfectly rotten . . . no man living can tell," says the defendant (Q. 132); but he adds, "You could have one hundred per cent. of them bad" (Q. 147); as, after a careful examination, "You cannot tell what is inside a can; you cannot look through tin yet" (Q. 148); and "that is an absolutely reasonable expectation in the trade" (Q. 150).

I do not accept the defendant's estimate of the amount of rotten fish which, it is reasonable to expect in the trade; but this evidence shews what he considered as to the goods sold by him to the plaintiffs.

That "Most Reverend Judge Mr. Anthony Fitz-Herbert," in his "*New Natura Brevium*" ("an exact work exquisitely penned," 10 Co. Rep., pref.) says (94 C): "If a man bargain and sell unto another certain pipes of wine and warrant them to be good, etc., and they are corrupted, he shall have an action on the case against him. But note: it behoveth that he warrant it to be good. . . . For if he sell the wine . . . without such warranty it is at the other's peril, and his eyes and his taste ought to be his judges in that case, 26 H.C. 35." The commentator, generally considered to have been Sir Matthew Hale, says: "Note a diversity between selling corrupt wines to (*sic*) merchandize, for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, if it prejudice any. See 19 H. 6, 49 accordant." (See note on this at the end of the judgment.)

This was referred to by Parke, B., giving the judgment of the Court, in *Burnby v. Bollett* (1847), 16 M. & W. 644. There the defendant, a farmer, had bought a carcase of a pig from a butcher and left it in the butcher's stall—the plaintiff came in, wanted the pig, was referred to the defendant and bought the pig without a warranty. It turned out unsound and unfit for human consumption; but it did not appear that the defect, which was "secret," was known to any of the parties. Parke, B., in the course of the argument, had said (p. 649): "The sole point for consideration is, whether an ordinary individual, not clothed with any character

of general dealer in provisions, who *bonâ fide* sells meat for human consumption, is liable to an action on the case by the buyer of the article if it proves unsound. This is not the case of a butcher, or taverner, or farmer killing or exposing to sale meat in open market, who may be reasonably taken as impliedly warranting the meat to be sound." In giving the judgment of the Court, he speaks of the note of Sir Matthew Hale (changing the word before "merchandize" from "to" to "as") and approves of the distinction. "The defendant . . . was not dealing in the way of a common trade (victuallers, butchers, and other common dealers in victuals, see p. 654.) . . . He falls within the reason of the former part of Lord Hale's distinction; and there being no evidence of a warranty, or of any fraud, he is not liable."

In *Emmerton v. Mathews* (1862), 7 H. & N. 586, it was held that a salesman in Newgate market, who had sold there certain meat which was found afterwards to be unfit for food, but which he had no means of knowing or reason to suspect was other than good and wholesome meat, was not liable to an action upon an implied warranty. (What was meant by "no means of knowing," etc., is considered in *Smith v. Baker* (1878), 40 L.T.R. 261, to be mentioned later.) The defendant in this *Emmerton* case was a person who sold on commission the meat consigned to him by his employers: and the plaintiff bought the meat on his own inspection (p. 587). (On p. 592 Keene *arg.* cites the note attributed to Sir Matthew Hale, "to merchandize.")

In *Bigge v. Parkinson*, 7 H. & N. 955, the plaintiffs had entered into a contract to convey East India Company troops to Bombay, and the defendant undertook to supply the plaintiffs with troop stores. The Court of Exchequer Chamber held that there was an implied warranty that these stores should be reasonably fit for the purpose for which they were intended, and Cockburn, C.J., during the course of the argument, said (p. 959): "Where a person undertakes to supply provisions, and they are supplied in cases hermetically sealed, but turn out to be putrid, it is no answer to say that he has been deceived by the person for whom he got them"—and repudiates the proposition that there can be any difference between a manufacturer and one who undertakes simply to sell, and says, "I do not manufacture, but I will sell you the article you wish."

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The *locus classicus* of the law in respect of sales of goods and warranties to be implied on such sales is *Jones v. Just* (1868), L.R. 3 Q.B. 197—Mellor, J., giving the judgment of the Court (Cockburn, C.J., Blackburn and Mellor, JJ.): and to this I shall recur.

Perhaps the latest case in which is discussed fully the question of implied warranty on a sale of articles of food is *Wallis v. Russell*, [1902] 2 I.R. 585. There the food was sold over the counter of a fishmonger's shop to a customer who "wanted two nice fresh crabs for her tea"—the fishmonger handed her two which he *bonâ fide* believed to be fresh and fit for human food, but which were not, for the plaintiff and her friend, who ate portions of them that evening, became violently ill. It was held by the King's Bench Division that a verdict at the trial for £150 must stand, and this was sustained by the Court of Appeal. But this was on the ground that the goods were sold for a particular purpose, *i.e.*, for consumption as human food—which was indeed the real ground of the decision in *Bigge v. Parkinson* and of *Beer v. Walker* (1877), 46 L.J.N.S. Q.B. 677. In the last-named case the defendant, a wholesale provision dealer in London, undertook to furnish the plaintiff, a retail tradesman at Brighton, with a quantity of Ostend rabbits weekly. The Court (Grove and Lopes, JJ.) held that there was an implied warranty of quality (p. 679): "It cannot . . . be contended that when a person undertakes to supply another with goods which are not specific goods, there is not an implied warranty that the goods shall be fit for the purpose for which they ordinarily would be intended to be used, and, with regard to animals used for human food, that they are fit to be so used."

The same two Judges, in the following year, decided *Smith v. Baker*, 40 L.T.R. 261. The plaintiff, a retail butcher, selected and bought from the defendants, who were meat salesmen at the central meat market, a quantity of beef which had been consigned by a butcher to the defendants for sale on the consignor's account. It was found on cutting it up to be unfit for human food, and, at the trial before the Deputy Judge of the City of London Court, he entered judgment for the plaintiffs as on an implied warranty. Grove, J., says (p. 261): "Those cases establish the principle that where goods are sold to the order of the purchaser, there is an implied warranty that the goods shall be merchantable; but that where

a specific article is sold, and the purchaser has had an opportunity of inspection, there is, as a general rule, no implied warranty." And, discussing *Emmertton v. Mathews*, he says: "It is argued that in that case the decision proceeded on the fact that the seller had no means of knowing that the meat was other than wholesome, and here there was no such finding. But we think that it must be taken that what the Court meant in that case was, no means of knowing on an ordinary outward inspection. . . ." And, speaking of *Burnby v. Bollett*, 16 M. & W. 644, Grove, J., p. 262, goes on to say: "There the words 'has not any means of knowledge, the defect being latent,' must mean any external means of knowledge." On p. 263 the learned Judge draws the distinction: "If the butcher had not gone and selected his meat, but had ordered it, there would have been, no doubt, an implied warranty . . . that it was of merchantable quality. But the purchaser here went into the market and inspected the meat. . . . I am therefore of opinion that this case comes within the case of *Emmertton v. Mathews*. . . ." Lopes, J., agreed, but went further, on the authority of *Parkinson v. Lee* (1802), 2 East 314, which seems now not to be considered good law: see *per* Brett, L.J., in *Randall v. Newson* (1877), 2 Q.B.D. 102, 106.

The distinction between the case of a specific article *in esse* and goods ordered of a specified description is very clearly shewn in these two cases, before the same two Judges, and I venture to think that the cases are nearly all reconcilable when that distinction is borne in mind, if there is added the further principle, that "where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied:" *Jones v. Just*, L.R. 3 Q.B. at pp. 202, 203.

The present case is not one of a specific chattel chosen by the purchaser, like *Smith v. Baker*, but of goods which are not specific goods supplied by a dealer, as in *Beer v. Walker*, and "sold for a particular purpose, *i.e.*, for consumption as human food." Because I do not understand that the purchaser necessarily is expected to consume them, but the reasonably proximate purchaser

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is to consume them—I can see no difference between the Brighton tradesman and the plaintiffs at Hamilton, except that the plaintiffs sold to those who sold to the ultimate consumer, whereas the Englishman probably sold immediately to the consumer, and that distinction is, to my mind, of no importance.

The cases just considered shew how far we have got away from the dictum of Sir Matthew Hale—if he be really the author of the note to Fitz-Herbert *Natura Brevium*, 94 C (and the Dict. Nat. Biog., vol. 19, p. 170, expresses no doubt on the subject). The “diversity” laid down then, *i.e.*, in 1660 sqq., by Hale (see Dict. Nat. Biog., vol. 24, p. 24), is whether the wine be sold “to merchandize” (not “as merchandize,” as some have it) or “for a taverner or victualler”—this distinction corresponding to ours, whether the sale be not or be for a particular purpose. Our distinction, as indicated in the two cases we are considering, is, whether the article is specific and open to inspection, or the goods are supplied on an order from a dealer dealing in such goods.

The Imperial Parliament, legislating with *Jones v. Just* before their eyes (*Wallis v. Russell*, [1902] 2 I.R. 585, at p. 593, *per* Palles, C.B.; p. 610, *per* FitzGibbon, L.J.; p. 632, *per* Holmes, L.J.), laid down the following amongst other rules in sec. 14 of the Sale of Goods Act, 1893 (56 & 57 Vict. ch. 71): “Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.” And “An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.” This did not, I think, change or modify, but only codified, the common law, and I accept it as correctly stating the law; of course, a condition becomes a warranty where the purchaser has received a substantial part of the goods: see cases cited in *New Hamburg v. Webb*, in the Divisional Court.

However the case be put, in the present instance the defendant undertook to supply to the plaintiffs goods fit for human consumption and the implied warranty arose—or the goods were bought by description, from which an implied warranty arose that they are of merchantable quality, *i.e.*, that not more than from ten to

fifteen per cent. at the outside are bad. In either view, the defendant is liable on the implied warranty. The following cases have more or less bearing upon the matter: *Mody v. Gregson*, L.R. 4 Ex. 49; *Randall v. Newson*, 2 Q.B.D. 102; *Drummond v. Van Ingen* (1887), 12 App. Cas. 284; *Jones v. Padgett* (1890), 24 Q.B.D. 650.

There must be judgment for the plaintiffs declaring the defendant liable, not only on the express warranty, but also on the implied warranty that at least eighty-five per cent. of the goods supplied were fit for human food; and a reference to the Master in Ordinary to determine the amount of damages.

The third parties do not dispute liability for their express "warranty," but deny liability upon any implied warranty; and chiefly on the ground that the circumstances of the sale by them rebut any such warranty.

Lord, called as a witness by the defendant, is the manager of the cannery, and he swears that the common practice is that the purchaser has to take chances (Q. 54); this, however, seems to refer to the "drys" only; but (Q. 60) "any person buying 'do-overs' has got to take what comes—that is the reason he gets it cheap." (Q. 62): "A percentage do not turn out first-class;" and (Q. 63) "that is why they are sold at such a low price." The defendant says (Q. 22): "'Do-overs' are looked upon as when you buy them you buy them as fish that may be perfectly sound and it may be absolutely rotten, you cannot tell." (Q. 33): "With regard to the 'do-overs,' the man who buys them knows the risk that he is running—'do-overs' are well known in the east as 'do-overs.'" (Q. 53): "Every care was taken in testing it. . . ." (Q. 56): Inspection was "very careful, especially careful." (Q. 67): When he purchased the salmon he was fully aware that in some cases they might turn out absolutely rotten, putrid. (Q. 69): In nearly every case there is a percentage, larger or smaller, of bad fish. And (Q. 70): That is the reason why 'do-overs' are sold cheaper. (Q. 74): He bought these 'do-overs' from the cannery with all these circumstances in his mind, and with the guarantee from the company. (Q. 75): "And with that guarantee you had all these circumstances in your mind?" A. "Certainly, inasmuch as no man can tell what is inside of a can; he can use his judgment, which was done." (Q. 79): "They are a doubtful quantity so far as

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quality is concerned." And (Q. 80): He had all that in contemplation when he bought. (Q. 96): He bought 800 cans. (Q. 103 *sqq.*): "Subject to my inspection and careful culling, went to the cannery and made a personal inspection." (Q. 14 *sqq.*): "Sorting out those which were light," etc. (Q. 109): "Very, very careful." (Q. 125): "Took a guarantee." (Q. 132): "You cannot tell 'do-overs'—whether they are perfectly sound or perfectly rotten . . . no man living can tell." (Q. 146): "'Do-overs' are always handled in the salmon trade as 'at the end of a pole' you might say, we know that 'do-overs' are 'do-overs,' and they are not good fish . . . and I took special care over that parcel, and that is why they were culled so heavily." (Q. 147): "You would not expect, then, after such a careful examination, that over fifty per cent. of these 'do-overs' were bad, would you?" A. "I would not give an opinion on that at all, for the simple reason you could have one hundred per cent. of them bad." (Q. 150): "That is an absolutely reasonable expectation in the trade." (Q. 175): "I have known nearly eighty per cent. of the pack to be tainted." (Q. 234): "I would not be surprised if the whole lot of them (when they arrived at Hamilton) were rotten." Although (Q. 120), "If the can is light and the salmon good . . . the salmon is just as good ten or fifteen years as what it was five days after. "But" (Q. 238) "'do-overs' . . . may be perfectly all good and they may be perfectly all bad." And (Q. 239) "You cannot tell in 'do-overs' the chance of their being bad or fifty per cent. bad." (Q. 303): "They were bought from the Canadian Canning Co. and sold by me."

Again, on being examined by counsel for the third parties: (Q. 9): He "understood that in buying 'do-overs' . . . a large proportion of these tins might contain sour or tainted fish, which could not be detected by the most thorough examination." (Q. 14): "The buyer takes the very considerable risk of sour or tainted fish."

It seems to me that the defendant, being aware of all the risks of bad fish in that lot which he was buying, and inspecting the goods with all the risks in his mind, and, after that inspection, being fully alive to all the risks, and thereupon asking for and receiving an express warranty, or at least indemnity, cannot set up any warranty to be implied.

“The law implies from men’s conduct contracts as binding as those made by express words, and such contracts are implied sometimes in furtherance of the intention or presumed intention of the parties, and sometimes in furtherance of justice without regard to the intention of the parties:” Addison on Contracts, 10th ed., p. 412.

So far as intention is concerned, “contracts are to be implied according to, not contrary to, the intention of the parties:” *per* Meredith, J.A., in *Barbeau v. Piggott* (1907), 10 O.W.R. 715, at p. 716. And, to my mind, nothing could be further from the mind of the defendant than that he was contracting for goods to be fit for human food, or that he was doing anything else than taking his chances. He thought, he says, that the plaintiffs could not claim against him on anything but the express warranty he had given, and it is, I think, clear beyond peradventure that all he was asking or expecting from the canning company was protection against loss upon that warranty. And it cannot, in my opinion, be said that, under the circumstances of the purchase here, it would be in furtherance of the ends of justice to infer a contract which neither party contemplated.

Nor do the authorities compel me to hold that there is an implied warranty by the third parties: Sale of Goods Act, 56 & 57 Vict. ch. 71, sec. 14 (Imp.); *Jones v. Just*, L.R. 3 Q.B. at p. 202; *Emmerton v. Mathews*, 7 H. & N. 586; and other cases.

It is plain that the defendant did not at all rely upon the skill or judgment of the third parties; and he must, therefore, base his whole claim upon the agreement in express terms by the third parties to indemnify him.

The third parties raise the question of the jurisdiction of the Court and refer to *McCheane v. Gyles*, [1902] 1 Ch. 287, as establishing that a third party notice cannot be served on a party out of the jurisdiction, except under circumstances in which, had he been a defendant in an action by the defendant, he could have been served.

The first argument of the defendant is based upon the form of the document—it is not exactly a warranty—“We hereby undertake to protect you against all legitimate claims for blows,” etc. The argument is that just as soon as the plaintiffs made a legitimate claim against the defendant, or at least as soon as the canning

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company had notice of it, it was their duty to settle with the plaintiffs, and thus protect the defendant against the claim. Therefore, the defendant might at once have sued the plaintiffs and the company to compel the plaintiffs to accept and the company to pay the legitimate claim. As the plaintiffs are within the jurisdiction, it would follow that the company would be rightly added: Con. Rule 162 (g); or, as it is put in the alternative, the place at which the contract is to be performed by the third parties is in Hamilton, and the performance is the payment by the third parties to the plaintiffs of their legitimate claim. Or, as it was put, the real contract of the canning company was to pay to the plaintiffs the amount of their legitimate claim; and this was a contract to be performed within Ontario: Con. Rule 162 (h).

If the words were not "protect . . . against," but "indemnify and save harmless . . . of and from," *Sutherland v. Webster* (1894), 21 A.R. 228, would be conclusive against the former position. There a covenant had been made by H. to indemnify W. against the liabilities, etc., of a firm. It was held that no cause of action accrued to W. or his assignee, against H., upon an action being brought for unliquidated damages for an alleged breach of an agreement of the firm. Osler, J.A., at p. 236, says: "He has not undertaken that no one shall sue W., but only to indemnify him against the liabilities, contracts, and obligations of the firm. The plaintiffs may not succeed in proving the cause of action alleged, and if they fail and W. recovers his costs, he could not . . . say that the covenant had been broken." The case is distinguished from *Leith v. Freeland* (1864), 24 U.C.R. 132, in which the third person was to pay a certain fixed sum of money upon a fixed day; *Mewburn v. MacKelcan* (1892), 19 A.R. 729, in which a judgment had been had against the person indemnified; *Wooldridge v. Norris* (1868), L.R. 6 Eq. 410; *Lacey v. Hill* (1874), L.R. 18 Eq. 182. Then at p. 237: "Here the plaintiff's claim is for unliquidated damages, the liability for, and amount of, which have yet to be established; and I have seen no case in which it has been held that an action will lie *quia timet* under such circumstances at the suit of the person to be indemnified."

I do not think that the wording of the document in the present case is materially different from that in *Mewburn's* case—I can find no case in which the word "protect" in such a document is

interpreted; and I think this and the document in *Mewburn's* case are practically the same.

The result is, that there is no action to compel the third parties to pay the claim of the plaintiffs, and so bring the place of performance of the contract within Ontario; nor can it be considered that the plaintiffs are proper or necessary parties to the action. The only action would be for a declaration of the rights of the defendant; and that would not have an Ontario *locus*.

Then it is said that the appearance without protest or objection to the jurisdiction bars the third parties from objecting.

There are many cases in our own Courts upon this subject; but Con. Rule 173,* it seems to me, has now made most of these inapplicable. It was thought in many cases that the mere appearance without objection to the jurisdiction was a waiver of his right to object (see the cases in *Holmsted & Langton's* Judicature Act, pp. 298, 317); and to avoid this rule working any hardship the new Con. Rule was passed, whereby, in a proper case, all the rights of the defendant may be saved.

It seems to me that now any one who does not avail himself of this Rule must be considered as waiving any right he may have to object to the (local) jurisdiction. The fact that the third parties here plead in their statement of defence to the jurisdiction does not help them—their election was made on entering their appearance, and, that appearance standing, they cannot take a new position.

The later cases in England, too, seem to hold that if; without pressure and voluntarily, the defendant attends the trial and takes part in it, he is not allowed to take advantage of his plea to the jurisdiction, even though that might otherwise be available. See *Westlake's Private International Law*, 4th ed., pp. 376, 377; *Dicey's Conflict of Laws*, 2nd ed., p. 370; and the cases cited.

I can, moreover, find no evidence that the "residence" of the third parties is not in Ontario—there is no evidence except that the contract was made in British Columbia.

I think the Canadian Canning Company must indemnify the defendant against loss so far as the express warranty is concerned; and they should also pay his costs, if any are paid by him to the

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plaintiffs so far as the express warranty is concerned. But the costs in this action are to a certain extent increased by the contest over the implied warranty. I think, therefore, the third parties should pay one-half of the costs of the third party procedure, one-half of the costs paid by the defendant to the plaintiffs, and one-half of the costs paid by the defendant to his solicitor. All these costs being taxed up to and including judgment.

The costs of the reference (at which the third parties must have leave to appear and to take part therein) will be reserved until after the Master shall have made his report.

NOTE.—The only two editions of Fitz-Herbert's *Natura Brevium* available are that in the general library at Osgoode Hall, the octavo of 1794, and my own, the small Savoy quarto of 1730. In the latter the words read "to Merchandize"—"Merchandize" having the capital letter; in the library copy the word has a small letter, as in the present style of printing and like the rest of the book. "To Merchandize" may, perhaps, mean the same thing as "as merchandise" in an archaic use of the word "as"—or the word may be a misprint or a *lapsus pennie* on the part of Sir Matthew Hale, who is said to have written his note on the margin of his copy of Fitz-Herbert. The simplest interpretation would, I venture to think, be "for the purpose of merchandising" in contrast with "for a taverner or victualler." "Merchandize" is a good verb; and the only objection I can see to taking it as a verb here is the fact that it appears with a capital. At the time the quarto edition appeared, it was a very general practice for printers to print all nouns (and, speaking generally, nouns only) with a capital, as is done in German at the present day. But sometimes the verb took a capital—an instance is given in the *New Oxford Dictionary*, with this very word used as a verb and capitalized, in a work printed 1673: "She could not Merchandize without knowledge in Australia." See *sub voc.* "Merchandise," pt. 2 of vol. 6, p. 346, col. 2.

The meaning may, therefore, be that, where the purchaser buys wine simply as a commodity to deal in, there is no implied warranty; *secus*, if he buy as a taverner, etc., to give to his customers for food.

[DIVISIONAL COURT.]

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Judgment—Action in County Court on Division Court Judgment—Lack of Finality—Court of Record—Authority of Previous Decisions—County Court Appeal.

A judgment of a Division Court cannot be enforced by action in a higher Court, because the obligation to pay thereby created is not an absolute obligation, but is subject to the discretion vested in the Judge to defer payment in certain circumstances; and the fact that a Division Court is now a Court of record makes no difference in that respect.

Berkeley v. Elderkin (1853), 1 E. & B. 805, *McPherson v. Forrester* (1854), 11 U.C.R. 362, and *Donnelly v. Stewart* (1866), 25 U.C.R. 398, followed.

Per BOYD, C., that the state of the law is unsatisfactory, but the earlier decisions, which have stood for more than fifty years, must be followed.

Per RIDDELL, J., that a Court sitting in appeal from a County Court decision, being the final Court, is not bound by previous decisions; but the decisions of the Court of Appeal in England are binding (*Trimble v. Hill* (1879), 5 App. Cas. 342, at p. 344); and *Berkeley v. Elderkin*, 1 E. & B. 805, has been approved by the Court of Appeal in *The Queen v. County Court Judge of Essex* (1887), 18 Q.B.D. 704.

Judgment of the County Court of the County of Hastings affirmed.

APPEAL by the plaintiff from the judgment of the Junior Judge of the County Court of Hastings dismissing an action brought in that Court upon three Division Court judgments, upon the ground that the Court had no jurisdiction.

October 18. The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

W. S. Morden, for the plaintiff. The learned trial Judge followed *Donnelly v. Stewart* (1866), 25 U.C.R. 398, which is discussed in Sinclair's Division Courts Act, ed. of 1879, pp. 5, 6. That author refers to 32 Vict. ch. 23, sec. 1, which was passed after the decision in the *Donnelly* case, and states his conclusion as follows: "It is therefore submitted that the Legislature, in giving to judgments of these Division Courts the force and effect of judgments of Courts of record, was giving a certainty and stability to such judgments, which from the remarks made by Lord Campbell in *Berkeley v. Elderkin*, and by Hagarty, J., in *Donnelly v. Stewart*, it was feared they did not then possess." I refer also to *Corsant qui tam v. Taylor* (1874), 10 C.L.J. N.S. 320. [RIDDELL, J., referred to *Aldrich v. Aldrich* (1893), 24 O.R. 124.] In that case the converse proposition was discussed, and the case is not an authority against the plaintiff here.

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W. N. Ponton, K.C., for the defendant. *Donnelly v. Stewart* is still binding on this Court, notwithstanding the statute of 32 Viet. That case followed *Berkeley v. Elderkin* (1853), 1 E. & B. 805, and sec. 252 of R.S.O. 1897, ch. 60, corresponds with the clause in the English County Courts Act (cited *in extenso* in that judgment) on which the case was decided. [RIDDELL, J., referred to *McPherson v. Forrester* (1854), 11 U.C.R. 362.] That case was followed in *Donnelly v. Stewart*. If the plaintiff's contention should prevail, many inconveniences and inconsistencies would result, and the beneficial provisions of the Division Courts Act by which the Judge retains control over the judgment, and can alter the mode and time of payment under it, would lose much of their efficacy. Reference was also made to *Hanmer v. White* (1844), 12 M. & W. 519, 520; *North v. Fisher* (1884), 6 O.R. 206; *The Queen v. County Court Judge of Essex* (1887), 18 Q.B.D. 704.

Morden, in reply.

October 22. BOYD, C.:—Unsatisfactory, in my opinion, is the state of the law as to the inability to sue in the higher Courts upon a judgment or judgments recovered in the Division Court. This result rests upon *Berkeley v. Elderkin*, 1 E. & B. 805, as applied to our procedure by the Court in *McPherson v. Forrester*, 11 U.C.R. 362 (1854). Of the various reasons assigned in the English case, only one was then and is now applicable to our Division Court judgments. That is the power which is given by the Division Courts Act, in sections corresponding to secs. 153 and 252 of R.S.O. 1897, ch. 60, to the Judge, at any time, for sufficient cause, to extend the time for payment or to make the judgment payable by instalments. This, it is said, reduces its character from a final to an interlocutory judgment, or, as put in the *McPherson* case, "It is not a final judgment, in the sense in which it must be final to make it the ground of an action in this Court, though final in this sense, that there is no appeal from the decision. Therefore (the Court proceeds), "the judgment must continue to remain within the control of the Division Court, not interfered with by any remedy for enforcing it elsewhere, or else the provisions made by the Legislature regarding such judgments would be defeated." 11 U.C.R. at p. 363. The Court explains the effect of a section of the Division Courts Act (216 of R.S.O. 1897, ch. 60) providing "that no costs shall be recoverable in an action

brought in any Court for the recovery of a sum awarded by judgment in a Division Court," by limiting this to any action in another Division Court. I share in the doubts expressed in the Manitoba Court in *Boyd v. Irwin* (1886), 3 Man. L.R. 90, 94, as to the soundness of this method of interpretation, having regard to sec. 323 of the old Common Law Procedure Act, C.S.U.C. ch. 22. The legislative language, to my mind, affords a strong implication that an action might be brought in a higher Court on a Division Court judgment, and repels any inference to the contrary which may be deduced from the power given to the Judge to stay or suspend payment and the process of execution. The judgment appears "to be final and conclusive," as expressed by the Act, and the judgments sued on have stood for nearly twenty years in that form. The possible power to vary the manner or time appears to me rather as a supplemental proceeding, not detracting from the finality of the judgment. Other sections of the Division Courts Act (not to be found in the English Act) are those providing for the removal of plaintiffs by way of *certiorari* and for the filing of transcript of judgment in the County Court for the purpose of execution against lands (secs. 81, 82, of the present Act) and sec. 142 of the C.S.U.C. ch. 19, in force when the Canadian cases were decided. All these provisions go to indicate that the higher Court is to be regarded as ancillary to the lower, and that recourse may be had to it by way of action on the judgment of the Division Court. Such is, indeed, the general rule as to the judgments in debt of inferior Courts: *Williams v. Jones* (1845), 13 M. & W. 628.

The other Canadian case of *Donnelly v. Stewart*, 25 U.C.R. 398, does not carry the matter any further; it merely affirms the earlier case, but apparently on the ground that, by reason of its having stood thirteen years unquestioned, the Court was not disposed to depart from it except on the strongest grounds. That case indicates, I think, the course that should be taken by us, *viz.*, to follow the earlier cases, which have now for over fifty years been regarded as law.

As this case cannot be taken to the Court of Appeal, it must be left for the consideration of the Legislature as to whether any change should be made on this point of law.

I would let the judgment below stand, with costs of action and appeal, to be set off against the debt of the defendant to the plaintiff.

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RIDDELL, J.:—This is an appeal from the judgment of the Junior Judge of the County Court of Hastings, whereby he dismissed an action brought in that Court upon three Division Court judgments.

If the County Court had jurisdiction, judgment should have been entered for the plaintiff; but it is contended that the objection to the jurisdiction is fatal.

The matter has been considered in our own Courts in two cases and referred to in a third.

In *McPherson v. Forrester*, 11 U.C.R. 362, and *Donnelly v. Stewart*, 25 U.C.R. 398, the decision of the Court was that there was no jurisdiction in the Queen's Bench or a County Court on a Division Court judgment—while in *Aldrich v. Aldrich*, 24 O. R. 124, at p. 128, Mr. Justice Meredith says this is well-settled law.

It has been pointed out, both before and since the Ontario Judicature Act, and before and since 58 Vict. ch. 12, sec. 79, now sec. 81 of the Ontario Judicature Act, that a Court sitting in appeal from a County Court decision, being the final Court, is not bound by previous decisions: *per* Hagarty, J., in *Donnelly v. Stewart*, 25 U.C.R. at p. 398; *per* Armour, C.J., in *Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116, at p. 118; *Mercier v. Campbell* (1907), 14 O.L.R. 639, at p. 645 (in the first two cases by a Judge giving the judgment of the Court).

If the case stood thus without anything further, we might not follow the cases in 11 and 25 U.C.R. without inquiring into the soundness of the decisions.

But there are authorities which we are bound to follow, whether they recommend themselves to our judgment or not.

In *Trimble v. Hill* (1879), 5 App. Cas. 342, at p. 344, the Judicial Committee say, speaking of a decision of the Court of Appeal in England, which is binding on all the Courts in England until a contrary determination is reached by the House of Lords: "Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it." It seems to me that this lays down a canon by which all Colonial Courts must govern themselves.

Now the Court of Appeal in England in *The Queen v. County Court Judge of Essex*, 18 Q.B.D. 704, have approved as law *Berkeley v. Elderkin*, 1 E. & B. 805, 22 L.J.Q.B. 281, 17 Jur. 1153. *Edwards v. Coombe* (1872), L.R. 7 C.P. 519, at p. 523, and

Bailey v. Bailey (1884), 13 Q.B.D. 855 (C.A.), at p. 860, are to the same effect.

Berkeley v. Elderkin is a case upon the statute 9 & 10 Vict. (Imp.) ch. 95, and decides that an action cannot be brought in the Court of Queen's Bench upon a judgment in the County Court. The chief reason given is that, by sec. 100 of that Act, the judgment of the County Court was not in the nature of a final judgment. That section is, in substance, sec. 252 of R.S.O. 1897, ch. 60; and we are, therefore, bound to hold that a Division Court judgment is not in the nature of a final judgment.

Nor does 32 Vict. (O.) ch. 23, sec. 1, advance matters at all—all that that section does is to make the judgments of the same effect, etc., as judgments of a Court of record. But a judgment such as we find in Division Courts, if it were to be made in the High Court, would still not be final, but in its nature interlocutory, such, e.g., as a decree for a fixed amount of alimony in the future: *In re Robinson* (1884), 27 Ch.D. 160 (C.A.); *Stones v. Cooke* (1834-5), 7 Sim. 22, 8 Sim. 321 n.; *Prescott v. Prescott* (1868), 20 L.T.N.S. 331; *Bailey v. Bailey*, 13 Q.B.D. 855, at pp. 857-8; *Linton v. Linton* (1885), 15 Q.B.D. 239 (C.A.); and the like cases. So that this section does not help.

Some of the arguments made before us were upon the hypothesis that the former cases were based in whole or in part on the fact that the Division Court was not a Court of record, and it was argued that this section had dignified the Court. But this is not the case; and we find that the English County Court is by statute a Court of record (9 & 10 Vict. ch. 95, sec. 3).

The appeal must be dismissed; but, as the commentators on the Division Courts Act have indicated doubt as to the law since the Act of 1869, there should be no costs of the appeal.

MIDDLETON, J.:—When a Court of competent jurisdiction has found a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt may be maintained in a Superior Court, and this is so whether the Court is a Court of record or not: *Williams v. Jones*, 13 M. & W. 628. The judgment must be one which "conclusively, finally, and forever established the existence of the debt:" *Nouvion v. Freeman* (1889), 15 App. Cas. 19.

Because of the lack of this element of finality, an order for the

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payment of alimony does not afford a basis for an action at law: *Robins v. Robins*, [1907] 2 K.B. 13; *Bailey v. Bailey*, 13 Q.B.D. 855; *Ivimey v. Ivimey*, [1908] 2 K.B. 260.

An order of any Court for payment of costs cannot be enforced in any other Court, because it is not regarded as a judgment imposing any obligation, but as a mere remedy ancillary to the proceedings in that Court itself. This is so even when the order "may be enforced in the same manner as a judgment"—this merely indicating that, in the Court itself, the same process may be employed to enforce payment of money under an order as under a judgment: *Furber v. Taylor*, [1900] 2 Q.B. 719; *Re Kerr v. Smith* (1894), 24 O.R. 473.

Where the rights of the parties are adjudicated upon and determined, although the determination is in the form of an order, an action will lie: *Godfrey v. George*, [1896] 1 Q.B. 48; *Pritchett v. English and Colonial Syndicate*, [1899] 2 Q.B. 428.

Berkeley v. Elderkin, 1 E. & B. 805, as explained by *Austin v. Mills* (1853), 9 Ex. 288, determines that a judgment of a County Court (in England) is not such a judgment as can be enforced by action, because the obligation to pay thereby created is not an absolute obligation, but is subject to the discretion vested in the Judge to defer payment under certain circumstances. The judgment is an absolute determination of the rights of the parties, and operates as a merger of the original cause of action, but the statutory provisions prevent any unconditional promise arising by implication, as in the case of ordinary judgments. This decision has been accepted in our own Courts in *McPherson v. Forrester*, 11 U.C.R. 362, and *Donnelly v. Stewart*, 25 U.C.R. 398.

How wide the powers vested in the Division Court Judge are, can be seen by reference to the Division Courts Act, 10 Edw. VII. ch. 32, secs. 122 and 124 (O.)*

* 122.—(1) The Judge may order the times and the proportions in which any sum and costs recovered by judgment shall be paid, having regard to the provisions of section 124.

(2) Unless otherwise ordered, execution shall not issue within fifteen days after the entry of judgment, but the Judge may order the amount of the judgment or any instalment thereof to be paid into Court.

124. Except where a new trial is granted, the issue of execution shall not be postponed for more than fifty days from the service of the summons, without the consent of the party entitled to the same; but if it is proved to the satisfaction of the Judge that a party is unable, from sickness or other cause, to pay the debt or damages recovered against him, or any instalment thereof ordered to be paid, or that for any other reason the issue of execution should be further postponed, the Judge may stay the judgment, order or execution for such time and on such terms as he thinks fit, and so from time to time until it is proved that the cause of disability has ceased.

The plaintiff, having a cause of action, has resorted to the statutory forum—the result is that his original claim has been transmuted into a judgment bereft of some of the qualities ordinarily incident to common law judgments, and subject to such benevolent supervision and restraint as precludes any action upon it in any other forum, but he must be content with the result he has himself brought about, even though driven to this kindly tribunal by salutary rules as to costs. This is the meaning of *The Queen v. County Court Judge of Essex*, 18 Q.B.D. 704.

Appeal dismissed with costs to be set off against the judgment.

[IN THE COURT OF APPEAL.]

CITY OF WOODSTOCK V. COUNTY OF OXFORD.

Municipal Corporations—Separation of City from County—Special Act, 1 Edw. VII. ch. 75 (O.)—Agreement as to Assets—Surplus Fund in Hands of County not Taken into Consideration—Right of City to Share in Fund—Municipal Act, 1903, secs. 21 (3), 408—Trust—Enforcement—Statute of Limitations.

By 1 Edw. VII. ch. 75 (O.), the Town of Woodstock was erected into and incorporated as a city. On the 10th February, 1900, the city corporation, the plaintiffs, and the Corporation of the County of Oxford, the defendants, entered into an agreement, ratified by by-laws of both corporations, and apparently taken and accepted by both as comprising and settling all questions between them arising out of the erection of the town into a city, and it was subsequently acted upon and its terms complied with by the plaintiffs until shortly before the commencement of this action, on the 23rd December, 1907. The reason for the action was the discovery by the plaintiffs, as they alleged, that at the time of the erection of the town into a city there was in existence a surplus fund standing to the credit of the defendants, amounting to about \$37,000, which had been collected through the various local municipalities comprising the county, including the town of Woodstock, from the ratepayers thereof, and that, in the negotiations preceding and in the making of the agreement, this surplus fund was not taken into account or dealt with in any respect. By sec. 4 of the statute mentioned it was enacted that "The City of Woodstock shall in all matters whatsoever stand and be in the place and stead of the Town of Woodstock, and all property of every kind and all rights, interests, assets and effects, taxes, rates, dues, revenues, obligations and income now belonging to, or accruing due to, or which may be assessed for by the said town, shall pass, belong to and be the rights, property, assets, effects, taxes, revenues and obligations of the City of Woodstock; . . . the meaning and intention hereof being that in all matters and things the said city shall be and stand in the place of the said town." And the plaintiffs, in virtue of this Act and of the Municipal Act, said that they were entitled to receive from and be paid by the defendants some part of the surplus fund. A charge was made against the defendants of fraud, misrepresentation, or concealment, but this was found in favour of the defendants at the trial, and was not part of the case upon appeal. The plaintiffs did not ask to have the agreement of the 10th February, 1902, set aside, but sought some modification or reformation of its terms:—

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Held, GARROW and MACLAREN, JJ.A., dissenting, that the plaintiffs were not entitled to any relief.

Judgment of MULLOCK, C.J.Ex.D., affirmed.

Per Moss, C.J.O.:—However, or through whatever means, the fund was permitted to accumulate—and they are to be assumed not to have been improper or dishonest—it constituted and was a surplus fund. It represented rates received from the municipalities comprising the county, provided for and raised by the county, as prescribed by secs. 402 to 407, inclusive, of the Municipal Act, 1903. Under the provisions of the Assessment Act then in force, these rates were collected by the tax collectors for the various municipalities, and with this duty the councils of the municipalities have nothing to do; it is a statutory obligation which the clerk of the municipality owes to the county and is bound to perform. For several years the sums collected exceeded the estimates, and so, by operation of sec. 408, the balance would form part of the general fund of the county municipality; and no one of the municipalities comprising the county has, as a distinct entity, any property in or right to an aliquot or even a proportionate part. The surplus fund could not be said to be a trust fund held for the benefit of the plaintiffs, nor did they represent in this action the ratepayers by whom the rates were paid, for the purpose of enforcing any supposed trust in respect of it.

Per MEREDITH, J.A.:—No part of the money in question ever was “the property” of the plaintiffs, and they never had any right to it; and any substantial question respecting it lay between the ratepayers from whom it was exacted, if unduly exacted, and the defendants. But, if the plaintiffs had all the rights of the ratepayers of their municipality vested in them, their claim would be barred by the Statute of Limitations; for the levy, as to the yearly excesses, was intentionally made for the purpose of creating a “rest,” and, so dealt with, the claim would be substantially one for money received by the defendants for the use of the plaintiffs. And, if the claim could be regarded as one made against a trustee, in the ordinary sense, it would be barred under sec. 32 of the Trustee Act.

Per MAGEE, J.A.:—In the absence of legislative provisions, there was no right to share in the surplus fund; it was not like a sinking fund applicable to the reduction of liabilities; its disposal was absolutely in the discretion of the county council as to what localities in the county it should be expended in; it was impossible to say what proportion of it should, as a matter of justice, be expended in or for the benefit of Woodstock; no machinery of the Court could ascertain that proportion; and the head of the city corporation, representing that corporation in the negotiations, admittedly abstained from inquiry, thinking that course to be for the benefit of the city, and no advantage was taken by the county representatives.

Per GARROW, J.A.:—Without any special provision in the Municipal Act upon the subject, the defendants were trustees of the fund for the various local municipalities who had been made to contribute to it, to the extent of their several contributions; and, no legal appropriation of the fund having been made, it should have been taken into account, and the plaintiffs’ share therein allowed, in the settlement consummated by the agreement of the 10th February, 1902. That settlement could not, in the circumstances, be allowed to stand, but must be opened up, unless the parties could agree upon the extent of the relief to which the plaintiffs were entitled, apart from the agreement. The plaintiffs’ claim was not a mere money demand, but an equitable claim, to which the Statute of Limitations would apply only from the time of the discovery, without laches, of the mistake or omission; the discovery was not made until long after the agreement, and within the period of six years before the action began; and, as even those who acted for the defendants in arranging the settlement admitted ignorance of the existence of the fund, the plaintiffs were not guilty of carelessness in not sooner becoming aware of the facts.

Per MACLAREN, J.A.:—It was not disputed that the surplus fund was not taken into account in arriving at what the liabilities or debts of the defendants amounted to, or in determining what portion of such debts it would be just that the plaintiffs should pay, to use the language of sec. 21,

sub-sec. 3, of the Municipal Act, 1903, made applicable by sec. 6 of the special Act. The word "debts" in sub-sec. 3 means the net debts after deduction of the moneys on hand set apart for or properly applicable to such debts. The existence of this fund was exclusively within the knowledge of the defendants, and it should have been disclosed, and, not having been disclosed or dealt with in any way, it might now be dealt with and justice done. There was no evidence that the plaintiffs were aware of the existence of the surplus until the defendants undertook to distribute it, and, inasmuch as the defendants did not disclose the fact when they should have done so, the plaintiffs should not be barred by any period short of that fixed by the Statute of Limitations, which had not run if the plaintiffs could not have brought an action before the agreement, as would be the case.

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AN appeal by the plaintiffs from the judgment of MULOCK, C.J.Ex.D., pronounced at the trial of the action on the 28th December, 1909, dismissing the action with costs.

The appeal was taken to the Court of Appeal pursuant to an order of MACLAREN, J.A., dated the 31st January, 1910, giving the plaintiffs leave to appeal directly to that Court.

The action was brought to recover a proportion of a surplus fund standing to the credit of the defendants at the time of the erection of the Town of Woodstock into a city and the separation of the city from the county, but not taken into consideration at that time in adjusting the accounts between the two municipalities.

April 29. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

G. H. Watson, K.C., and *Neil Sinclair*, for the plaintiffs. The defendants having collected from the ratepayers of the different municipalities constituting the county of Oxford a sum greatly exceeding the county's requirements, the plaintiffs are entitled to recover the portion contributed by the ratepayers of the former town of Woodstock towards such excess. See 1 Edw. VII. ch. 75, sec. 4 (O.), the special Act incorporating the town as a city; and the latter part of sub-sec. 2 of sec. 27 of the Municipal Act, R.S.O. 1897, ch. 223—"and they shall also ascertain, and allow to the town, the value of its interest in all county property, except roads and bridges within the town." The collection by the county for county purposes of an amount far in excess of what was actually required was an illegal act, and the excess so collected constituted a trust fund recoverable by the respective municipalities contributing thereto, including the plaintiffs. A perusal of secs. 402, 403, 404, and 406 of the Consolidated Municipal Act, 1903, will shew that the council cannot assess for more than the estimated cost for the

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year. [Moss, C.J.O.:—Does not sec. 408 provide for the case of an excess?] That refers to a slight excess only. Here the excess is a great sum. The town corporation did not at any time take proceedings under the provisions of sec. 21 or sec. 27 of the Municipal Act, and the case of the plaintiffs is not at all the erection of a town into a city under the Municipal Act, or the withdrawal of a town from the jurisdiction of a county under the Municipal Act; but it is the case of a special Act of the Legislature incorporating the plaintiffs as a city, in no way in pursuance of or governed by the provisions of the Municipal Act. The town did not withdraw from the county. No by-law was passed therefor by the town, and there was no requirement that the county should pass and confirm a by-law. Indeed it would be wholly inapplicable and inappropriate. The procedure of the Municipal Act did not apply. In the settlement made between the plaintiffs and defendants by the agreement of February, 1902, this surplus fund, being unknown to the plaintiffs, was not taken into account, but should have been, and the plaintiffs' share should have been allowed. The Statute of Limitations does not apply here. A part of this surplus fund was collected within six years before action. We refer to *Cameron v. Campbell* (1882), 7 A.R. 361; *Coyne v. Broddy* (1888), 15 A.R. 159; *Lyell v. Kennedy* (1889), 14 App. Cas. 437, 455; *Re Township of Albemarle* (1880), 45 U.C.R. 133; *Village of East Toronto v. Township of York* (1889), 16 O.R. 566.

J. Bicknell, K.C., and *G. F. Mahon*, for the defendants. The moneys in question always were the property of the defendants free from any trust in favour of the plaintiffs. Unless the defendants were a consenting party, they need not give the new city anything. When taxes have been paid to a municipal corporation voluntarily, and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover from the municipality the money so paid: *Cushen v. City of Hamilton* (1902), 4 O.L.R. 265; *Canadian Pacific R.W. Co. v. City of Quebec* (1899), 30 S.C.R. 73; the Assessment Act, R.S.O. 1897, ch. 224, secs. 91, 93, 129, 264, and 274. The plaintiffs having withdrawn from the county, all the property theretofore owned by the county continued to be the property of the county, free from any rights of the plaintiffs therein: Municipal Act, R.S.O. 1897, ch. 223, sec. 27 (6); 63 Vict. ch. 23, sec. 2; 1 Edw. VII. ch. 75.

sec. 6; Consolidated Municipal Act, 1903, sec. 408. If the plaintiffs ever had any rights, they are barred by the Statute of Limitations. All the moneys in this fund were collected more than six years before the commencement of the action.

Watson, in reply.

October 22. Moss, C.J.O.:—Appeal by the plaintiffs from the judgment of Mulock, C.J., after trial without a jury, dismissing the action.

There is now no dispute as to the facts. Most of them appear or are to be gathered from documents. The only dispute on oral testimony was one involving a charge by the plaintiffs against the defendants of fraud, misrepresentation, or concealment; and it was determined in the defendants' favour at the trial. Any element of want of good faith or intentional wrongful conduct must now be regarded as eliminated from the case.

In the year 1901 an Act of the Legislature was passed, at the instance of the Town of Woodstock, erecting it into and incorporating it as a city.

In the month of February, 1902, the plaintiffs, the city, and the defendants, the county, entered into an agreement, ratified by by-law of both corporations. This agreement was at that time apparently taken and accepted by both parties as comprising and settling all questions between them arising out of the erection of the plaintiffs into a city, and it was subsequently acted upon and its terms complied with by the plaintiffs until shortly before the commencement of this action, on the 23rd December, 1907.

The reason for the action was the discovery by the plaintiffs, as they allege, that at the time of their erection into a city there was in existence a surplus fund standing to the credit of the defendants, amounting to \$37,000, or thereabouts, which had been collected through the various local municipalities comprising the county, including the town of Woodstock, from the ratepayers thereof, and that, in the negotiations preceding and in the making of the agreement, this surplus fund was not taken into account or dealt with in any respect.

By the 4th section of the special Act, 1 Edw. VII. ch. 75, it was enacted that "The City of Woodstock shall in all matters whatsoever stand and be in the place and stead of the Town of Woodstock,

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and all property of every kind and all rights, interests, assets and effects, taxes, rates, dues, revenues, obligations and income now belonging to, or accruing due to, or which may be assessed for by the said town, shall pass, belong to and be the rights, property, assets, effects, taxes, revenues and obligations of the City of Woodstock; . . . the meaning and intention hereof being that in all matters and things the said city shall be and stand in the place of the said town."

The plaintiffs say that, in virtue of the said Act and of the Municipal Act, they are entitled to receive from and be paid by the defendants some part of the surplus fund in question. And they make their claim in several forms. They claim: (a) payment by the defendants of \$4,000 or of such sum as constitutes the proper proportion of the fund to which they are entitled; (b) an accounting by the defendants in respect of the collection and receipt of the said funds, and of the purposes and objects of the collection and receipt, and the use and application of the said funds, and of the proper proportion of the same to which the plaintiffs are entitled; (c) a declaration of the plaintiffs' rights in and to a portion of the said funds and of the obligation and liability of the defendants in respect thereof; (d) such further declaration as to the construction of the agreement of the 10th February, 1902, as may be proper, and, if necessary, such amendment, modification, and reformation therein as may be proper to support the claim of the plaintiffs and to establish that the defendants are not entitled to rely thereon as an answer to the plaintiffs' claim; (e) a declaration as to the wrongful and illegal act of the defendants in the assessment and collection of the said moneys and in the holding and retention thereof; (f) a declaration as to the wrongful and illegal and fraudulent acts of the defendants in suppressing and not disclosing and in misstating and misrepresenting to the plaintiffs the existence of the said surplus fund in and prior to the date of the agreement; (g) such further and other declaration and judgment as may be necessary; and (h) damages.

But in the end these wide and general claims virtually narrow down to two inquiries: are the plaintiffs entitled to any relief, and, if so, in what form?

As already said, the matter is now to be dealt with on the footing of no fraud or misrepresentation or intentional concealment or

overreaching on the part of the defendants. It is also to be observed that the plaintiffs do not in terms ask that the agreement of the 10th February, 1902, be set aside, but assume that it should stand as regards the matters dealt with by it, and on that footing they seek some modification or reformation of its terms. Yet, if the parties are, with relation to the surplus fund, to be put back into the position in which the plaintiffs say they were at the time of their erection into a city, it is difficult to see how this is to be accomplished with the agreement standing in the way.

It is difficult, too, to understand the position which the plaintiffs take with reference to their right to a portion of the fund. Putting it at the highest for them, the legislation did no more than to place them in the position the town occupied with reference to the fund at the date of the erection of the plaintiffs into a city. What was that position?

However, or through whatever means, the fund was permitted to accumulate—and they are to be assumed not to have been improper or dishonest—it constituted and was a surplus fund. It represented rates received from the municipalities comprising the county, provided for and raised by the county, as prescribed by secs. 402 to 407, inclusive, of the Municipal Act, 1903. Under the provisions of the Assessment Act then in force, these rates were collected by the tax collectors for the various municipalities, and with this duty the councils of the municipalities have nothing to do; it is a statutory obligation which the clerk of the municipality owes to the county and is bound to perform: *Mowat, V.-C.*, in *Grier v. St. Vincent* (1867), 13 Gr. 512, at p. 519; R.S.O. 1897, ch. 224, secs. 129, 130, 133, 144, 265.

For several years the sums collected appear to have exceeded the estimates, and so, by operation of sec. 408, the balance would form part of the general fund of the municipality.

Whether or not, by means of an information by the Attorney-General, at the instance of one or more of the minor municipalities, or of a ratepayer or ratepayers in one of them, the defendants could have been compelled to administer the fund in accordance with the terms of sec. 408, need not be inquired into. No such proceedings were taken. It seems plain that no one of the municipalities comprising the county had, as a distinct entity, any property in or right to an aliquot or even a proportionate part.

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Any benefit that might accrue to them or any of them could only come through the action of the county council, and whether any disposition of it would benefit any particular municipality, as apart from the other portions of the county, would depend upon considerations which it would be the province of the county council to deal with.

If the plaintiffs had continued as a town in the county, these would be their sole rights, and the legislation under which they withdrew does not appear to have placed them in any more advantageous position.

Then it is said that this is a trust fund upon which the Court may fasten and direct its administration. But it is a trust fund only in the sense that it is in the hands of the county and under the control of the county council, whose duty it is to deal with it in accordance with the Municipal Act. It cannot be said that it is a trust fund held for the benefit of the plaintiffs, nor that they represent in this action the ratepayers by whom the rates were paid, for the purpose of enforcing any supposed trust in respect of it. If a trust is to be enforced, it can only be at the instance of some person or body of persons entitled as an entity to benefit by the trust, and in an appropriate form of action with all parties interested in the trust properly represented.

The agreement of the 10th February, 1902, was made with reference to matters with which the parties were competent to deal as consequent upon the erection of the plaintiffs into a city, but in no case could it have dealt with the fund in question, unless, perhaps, by consent of all the municipalities.

From no point of view does it appear to me that the plaintiffs are entitled to relief in this action. And, in my opinion, the judgment appealed from should be affirmed, and the appeal dismissed with costs.

MEREDITH, J.A.:—A right conclusion of this case seems to me to be easily reached, if we take care to make a right beginning in considering it.

Let us begin with an inquiry where the money came from, and whose it was, and it may not be difficult then to determine whether the plaintiffs ever had any right to any part of it.

The money is the surplus of taxes levied for the defendants, for several years, over and above the defendants' annual expenditure.

The right of the defendants to levy taxes is unquestionable, but that right is not unlimited; it is limited in amount to a sum sufficient to pay all the valid debts of the municipality falling due within the year in which it is levied.

It is difficult, of course, to estimate beforehand exactly the amount required to pay such debts, and so provision is made for the case of a deficiency, and of an excess.

In case of an excess, the surplus is, generally speaking, to form part of the general fund of the municipality, and to be at the disposal of its council. There is no power to levy for the purpose of creating a surplus or rest.

It seems to me to be quite clear then that, if the fund in question were but an adventitious one, the unintended excess of levy over the amount actually required, the money would "form part of the general fund" of the defendants, "and be at the disposal of" its council.

If, on the other hand, the excessive levies were made, from year to year, intentionally, it would be unauthorised in law, and the defendants would not have been entitled to the money; but that is very far from saying that the plaintiffs would have any right to any part of it.

The levy was not made upon them, or by them; it was made upon the ratepayers of the defendants, by the defendants; it was the money of such ratepayers, unduly exacted from them; the ratepayers might have prevented the purposely excessive levy by legal proceedings; and, under certain circumstances, might have recovered the amount unduly exacted from them. But by what process did the plaintiffs ever become entitled to the money? The fact that the county's taxes may be levied through the officers of the minor municipalities can give no right; nor can the fact that the levy was made in fact upon those who were also ratepayers of the town; and there is nothing else, that I am aware of, that can be urged in support of any claim on the part of the plaintiffs to the money illegally exacted from others by the defendants. If the ratepayers were suing, could the plaintiffs be properly made parties to the action and liable for any claims the ratepayers might have?

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Having these things in mind, I am unable, by any process of reasoning, to reach the conclusion that any part of the money in question ever was "the property" of the plaintiffs, or that they ever had any right to it; and am of opinion that any substantial question respecting it lies between the ratepayers from whom it was exacted, if unduly exacted, and the defendants.

But, if these things were not so—if the plaintiffs had all the rights of the ratepayers of their municipality vested in them—their claim would, in my opinion, be barred by the Statute of Limitations. I am now dealing with the case upon the supposition—which I have, however, not the least doubt is the fact—that the levy, as to the yearly excesses, was intentionally made for the purpose of creating a "rest," and, so dealt with, the claim would be substantially one for money received by the defendants for the use of the plaintiffs; and I do not quite understand how any other question of trusteeship would arise. If, however, the claim would or could be one against a trustee, in the ordinary sense, why would it not be barred under the Trustee Act, sec. 32?

If the moneys could be considered as duly levied, then, as I have already said, under the municipal enactments they were made part of the general fund of the defendants, "at the disposal of the council;" and so the plaintiffs would have no right to them such as is claimed in this action. But it is impossible for me to find, in the face of the uncontrovertible facts, that they were so levied, and so were the result of mere repeated mistakes in the estimates; they very plainly were intended to create a "nest-egg."

I would dismiss the appeal.

MAGEE, J.A.:—The Act of 1901 (1 Edw. VII. ch. 75) incorporating Woodstock as a city on and after the 1st July, 1901, conferred upon it, by sec. 1, all the rights, powers, and privileges of cities under the Municipal Act, and in sec. 3 directed that vacancies in the council should be filled as provided in the Municipal Act; and then in sec. 6 declared that "the provisions of the Municipal Act relating to matters consequent on the formation of new municipal corporations and the other provisions of the Municipal Act aforesaid shall, except so far as is herein otherwise provided, apply to the said Corporation of the City of Woodstock in the same manner as if the said town had been erected into a city under the provisions of

the Municipal Act;" and by sec. 13 the city was to remain and form part of the county of Oxford for judicial purposes as provided in case of other cities in sec. 3 of ch. 3 of R.S.O. 1897, which relates to the territorial divisions of the Province. That last mentioned section 3 was thereby amended to include the city of Woodstock, and declares that, for municipal purposes, the cities therein named and all towns withdrawn from the jurisdiction of the county shall not form part of the counties in which they are situate. Under sec. 6 of that ch. 3, the court-houses, gaols, high schools, and all other property, real and personal, of the counties, at the time that Act came in force, were to belong to and continue in the counties. The special Act of 1901, therefore, effected two things—the erection of the town into a city and the separation from the county. The distinction between the two has to be kept in mind.

For the advancement of a town to the rank of a city the Municipal Act, sec. 21, requires a population of 15,000, and, if the advancement is desired, the town council must take certain preliminary steps; they must give public notice and they must pay the county such portion (if any) of the debts of the county as is just, or agree with the county council as to the amount to be so paid, or, in case of disagreement, the amount shall be determined by arbitration, and, upon proof of this being done, the Lieutenant-Governor may by proclamation erect the town into a city. Thus the settlement as to the liabilities is precedent to the change. As Woodstock had not 15,000 population, that sec. 21 could not be availed of, and a special Act was necessary.

The Municipal Act also made provision, in sec. 27, for the withdrawal of a town from the jurisdiction of the county council, it being necessary for the town council to pass a by-law after it had been assented to by the electors, and, after the by-law passed, the amount the town should pay for the expenses of administration of justice, gaol, registry office, and other services, as well as for the existing debt of the county, was, if not mutually agreed upon, to be ascertained by arbitration, and, after all this was done, the Lieutenant-Governor might issue his proclamation withdrawing the town. Here again the settlement of the debt was to be precedent to the change.

At the argument of this appeal these two sections, 21 and 27, were much dwelt upon. But, as neither of them is of itself applicable,

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we must turn to the special Act to see what provisions are made so. Section 4, to which I have not yet referred, declares that the new City of Woodstock shall in all matters stand in the place and stead of the town, and all property of every kind, and all rights, interests, assets and effects, taxes, obligations, income, etc., then belonging or accruing to the town, shall pass to the city, and the city shall assume all debts, liabilities, etc., for which the town would but for the Act be liable, and all things which might be lawfully done by the town may be done by the city. This section 4 is the only section expressly dealing with finances.

As already mentioned, sec. 6 makes applicable certain parts of the Municipal Act. What are they? First, the provisions relating to matters "consequent on the formation of new municipal corporations," and, second, "the other provisions of the Municipal Act aforesaid," and these both are to apply "as if the town had been erected into a city under the provisions of the Municipal Act." Bearing in mind that secs. 1 and 3 had already introduced some provisions of the Municipal Act, it would seem that the words "the other provisions of the Municipal Act aforesaid" are to be read as "the other provisions aforesaid of the Municipal Act," and not as "the other provisions of the aforesaid Municipal Act;" but, whichever construction is adopted, they are limited by the subsequent words "as if the town had been erected into a city under the provisions of the Municipal Act"—the words are "had been erected." Under neither construction would either sec. 21 or 27 apply, for under sec. 21 there was nothing to be done after the town had been erected into a city, and sec. 27 did not apply to such a change, but only to the withdrawal of the town from the county.

Then we find in the Municipal Act a number of sections (Nos. 55 to 65), grouped under the heading "Division V—Matters Consequent upon the Formation of New Corporations," and this group would seem to be what the framers of sec. 6 had in mind when they followed so closely this heading. At the same time, if other sections relate to matters "consequent upon" such a formation, it would be too strict a construction to limit the reference to this Division V. But neither sec. 21 nor 27 relates to matters consequent upon, but to matters preliminary to, the proclamation which effects the changes thereunder, and neither, I think, has here any application,

and we must look elsewhere to find how financial matters are thereafter to be arranged.

Of the sections under Division V, the only ones applicable are sec. 55 and sec. 57. The latter provides that in case of the erection of a locality into a village, or of a village into a town, or of a town into a city, the village, town or city shall remain subject to the debts and liabilities to which the locality was previously liable, in like manner as if the same had been contracted or incurred by the new municipality; and, in case of separation of a union of counties or townships, it makes each county or township remain subject to the liabilities of the union. Section 55 declares that by-laws in force continue in force until repealed or altered, but shall not be repealed or altered unless that could legally have been done by the council which passed the same. These sections are evidently intended to guard the interests of debenture-holders and others who have acted on the faith of by-laws, and to cover financial as well as other by-laws, and are not limited to the by-laws of the village or town, but would seem to include county by-laws previously in force. Section 57 has not any greater effect than sec. 4 of the special Act. However, neither it nor sec. 55 has necessarily anything to do with the separation from a county, but only with the change to a different grade of incorporation, and they apply not only to the advancement of a town but also of a village and also of a town already separated from the county.

We are then confronted with the fact of a special Act effecting a separation and nothing more. The town or city would no longer be subject to the jurisdiction of the county council, but that is all. The town does not become entitled to any of the county property any more than it was before. We are left solely to the situation created by secs. 55 and 57, already referred to, as consequent upon the erection of a town into a city. They maintain the existing status as to liabilities, but they give no right of sharing in assets. The city succeeded under sec. 4 of the special Act to the rights and liabilities of the town, but there the matter ended so far as legislation was concerned. If we were at liberty by analogy to adopt sec. 21 or sec. 27 of the Municipal Act we might be able to say what should take place, but that is not open to us here.

However, the two corporations, city and county, set to work to make a settlement of the financial basis on which they would

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thereafter stand towards each other. A committee was appointed by each, and the committees met and finally recommended an agreement which was adopted and executed, dated the 10th February, 1902. It recites the special Act, and is stated to be "entered into pursuant to the provisions of the Municipal Act and amendments thereto for the purpose of settling the financial arrangements between the city and county as required by the said Act." It makes provision for the city's yearly contribution to the expenditure upon the county buildings, gaol, house of refuge, registry office, criminal justice, and other yearly outgoings, and to certain debentures issued by the county for the erection of the court-house and house of refuge, in which the city was to retain its interest. No reference is made to any other outstanding debts or assets. Perhaps there were no other debentures unpaid. As the city was retaining its interest in the court-house and house of refuge (as to which see sec. 6 of ch. 3, R.S.O. 1897, already referred to), it would seem proper that it should bear its share of the debentures issued therefor.

But it is now said there was a surplus of some \$37,000 at that time in the control of the county, arising from accumulation of savings over a number of years, in which the expenditure had not equalled the income. And of this it seems the city was not aware. Indeed, none of the members of the joint committee had knowledge of it, and now the city claims that a share of it should be paid to it.

It is not denied that there was such a surplus in some substantial shape. Whether it was actually in hand on the 1st July, 1901, or whether it may have been paid out on expenditure during the first half of 1901, in anticipation of being later recouped by the income of that year, does not appear, but I will assume that it was actually cash in hand.

As pointed out by the learned Chief Justice at the trial, that was held by the county for its general purposes; it might be applied to reduce the taxation for any one year, or, as was done in 1905 and 1906, to reduce it for a number of years. But, being so held, it was absolutely at the disposal of the county council, no part of it need have been spent for the sole or immediate benefit of Woodstock, and the Corporation of the Town of Woodstock had not as a corporation any right to any part of it while the town remained part of the county. It might be that other local municipalities in the

county might complain that the ratepayers of Woodstock had really not contributed a dollar towards it, but had received more than their share of benefits from the county. It might be that, although Woodstock had contributed a fair share, the needs of other localities in the county would have appealed more for some years to the council than those of the town. If the question had arisen between the committees, it is impossible now to say what answer would have been made by the county representatives, or, indeed, what solution would have been absolutely or even reasonably just. It is, therefore, out of the question for the Court to say that any precise part of it should be paid to the city.

But then the city might fairly say, "Even if it can not be fixed how much we should get, it is the fact that we entered into that agreement without knowledge of that surplus, and, if we had known it existed, we would not have done so, and, there being mutual mistake, the agreement should be reformed or set aside." Reformed it cannot be, if the city's share is not known. Should it be set aside? Leaving apart the length of time which has elapsed, what is the evidence? The then mayor of the city, one of its committee, is called, and he admits that he had the possibility of a surplus in mind, but, giving full effect to his evidence, he was in some way told there was none, but most probably a deficit. Now the city and its representatives had means of ascertaining as readily as the county whether there was a surplus or not. As a business man, the mayor must have known there was either a surplus or a deficiency, but he admits that, fearing a deficiency, of which the city might be asked to bear a share, he said nothing more about the matter. In his mind, therefore, the city would be gaining an advantage over the county by silence. I do not think, in those circumstances, a party would have the right to complain if it turned out that the advantage was on the other side. The city cannot be in any better situation than if it had paid money, as indeed it has under the settlement, and was, as it is, claiming it back. The right to recover back, even when careless, is subject to the proviso that the party did not mean to waive all inquiry, as was held in this Court in *Clarke v. Eckroyd* (1886), 12 A.R. 425. I think here there was the waiver, if the evidence put forward by the city is given effect to. Whether the mayor was misled by the county representatives, or by some casual conversation with

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some one else, makes, I think, no difference. The learned Chief Justice has, however, found that there was not any misrepresentation by them.

Upon the grounds, therefore, that, in the absence of legislative provisions, there was no right to share in that surplus; that it was not like a sinking fund applicable to the reduction of liabilities; that its disposal was absolutely in the discretion of the county council as to what localities in the county it should be expended in; that it is impossible to say what proportion of it should, as a matter of absolute justice, be expended in or for the benefit of Woodstock, and that no machinery of this Court could ascertain that proportion; and that the head of the city corporation, representing it in the making of the negotiations, admittedly abstained from inquiry, thinking that course to be for the benefit of the city, and no advantage being taken by the county representatives—I think the judgment appealed from should be affirmed.

GARROW, J.A. (dissenting):—Appeal by the plaintiff from the judgment of Mulock, C.J., dismissing the action.

By the statute of 1901, 1 Edw. VII. ch. 75, the former town of Woodstock was created a city on and after the 1st day of July, 1901. By sec. 4 it was declared that in all matters whatsoever the new city should stand and be in the place of the town, and all property of every kind and all rights, interests, assets and effects, taxes, rates, dues, revenues, obligations and income, then belonging to the town, should pass to the city . . . and that all acts, matters and things which might have been lawfully done by the town might lawfully thereafter be done by the city, the meaning and intention, as declared, being that in all matters and things the city should stand in the place of the town.

Section 6 provided that the provisions of the Municipal Act relating to matters consequent on the formation of new municipal corporations and the other provisions of the Municipal Act should, except as varied by the special Act, apply in the same manner as if the town had been erected into a city under the provisions of the Municipal Act.

Consequent upon the erection of the town into a city, and its separation from the county, negotiations were had for the adjustment of financial matters between the county and city, which re-

sulted in an agreement in writing dated the 10th February, 1902, whereby the city became bound to pay to the county as from the 1st July, 1901, certain payments, among others \$1,200 per annum upon outstanding debentures issued by the county, and payments for the maintenance of the house of refuge and the county buildings, including the registry office, for the administration of criminal justice, and for insurance upon the county property.

This agreement was approved of by both corporations by by-law, and has been acted upon ever since.

In the year 1893 there was a surplus of taxes over expenditure in the hands of the county treasurer of \$8,510.15. And this surplus was ignorantly or negligently allowed by the county officials to be added to and to accumulate from year to year, until in the year 1901 it had reached the large sum of \$37,000, or thereabouts.

The plaintiffs allege that, in the negotiations resulting in the agreement before mentioned, this surplus fund was not taken into account, that their representatives in such negotiations knew nothing of it, and it was in no way brought to their attention by the representatives acting for the county, who on their side say they too were wholly ignorant of the fact themselves. And the action was brought to recover from the defendants the plaintiffs' share as successors to the Town of Woodstock of such surplus, and, if necessary, to have the agreement set aside and the settlement reopened.

The defendants pleaded several defences, but did not deny the fact of the existence of the fund in question. They set up the agreement, ratified by by-law, that the contributions to the fund by the Town of Woodstock were made voluntarily with knowledge of all the facts, that the defendants acted in good faith and without fraud, the laches of the plaintiffs, and the Statute of Limitations.

Mulock, C.J., did not deal specifically with these defences or with any of them, but held that, under sec. 408 of the Municipal Act, these surpluses became and were the property of the county, and could not be sued for or recovered back by a contributing local municipality, and upon this ground dismissed the action. *143*

No explanation appears in the evidence of how it came about that such a large fund was allowed to accumulate, contrary to the spirit at least, if not to the letter, of the Municipal Act. That Act, in very specific terms, prescribes a course of procedure in

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municipal taxation which (except in the case of debts for which special provision is made) looks to an annual balancing, and, as near as may be, a clear slate. Section 404 directs that estimates shall be made of all sums which may be required for the lawful purposes of the municipality for the year in which the sums are required to be levied. Section 405 authorises the council to pass a by-law or by-laws levying and collecting a rate sufficient to raise the sums required by the estimates. By sec. 406, if the amount collected falls short of the sum required, the council may direct the difference to be made up out of any unappropriated fund belonging to the municipality; and by sec. 407, if there is no such fund, the deficiency may be equally deducted from all or any of the estimates. Then, after making these provisions, the Act, in sec. 408, to which the learned Chief Justice referred, and on which he relied, provides that, if the sum collected exceeds the estimates, the balance shall form part of the general fund of the municipality and be at the disposal of the council.

This was obviously intended to provide for the practical impossibility of so regulating estimates and collections that in the result they should be in absolute agreement. But it is equally obvious that the process thus so clearly pointed out involves regard being always had to what is already on hand unappropriated, and so available to meet the proposed expenditure, and necessarily, it seems to me, implies that only the balance shall be imposed by the county rate by-law, or collected from the minor municipality. It would follow that where from any cause the money on hand had been, as in this case, omitted or overlooked, a successful application might have been made to quash the by-law upon the ground that it imposed an excessive rate. And, if the separation had not taken place, that would probably have been the only course open to the town upon discovering the existence of the surpluses in question, for the by-laws imposing the rates would have been an effectual barrier in the way of an ordinary action for money had and received.

But the separation creates a new difficulty, owing to the absence of any specific provision defining the rights of the retiring municipality in the property of the county. Counsel for the plaintiffs contended that sub-sec. 2 of sec. 27 applies; but with that contention I am unable to agree. That section only applies to the

case of a town separated from a county. And its provisions were clearly not introduced by sec. 6 of the special Act, but only those applicable to the case of a town erected into a city, in which no corresponding language is to be found. That the new city (which is not separated for all purposes from the county) does retain an interest in at least some of the county property is apparent from the language of sec. 510. But that circumstance throws no light upon the present question. Nor does the language of sec. 4 of the special Act. What it does, and all it does, is to confirm to the new city all the rights and interests of the former town. But it does not in any way determine nor assist to determine what these rights and interests were in property held, as this fund was, by the county.

I am, with deference, unable to agree with the opinion of the learned Chief Justice that the matter is determined in the defendants' favour by the language of sec. 408. That section was never intended to justify such an accumulation of surpluses as that in question, although it may well be that, in the language of the section, the accumulation, having taken place, formed part of the funds of the county, and that down to the period of the separation it was at the disposal of the county council. But, having been accumulated, as in my opinion it was, contrary to the intention of the Act, by what really amounts to a species of extortion or at least of coercion under the form of rate by-laws passed by that council, it did not cease to be equitably at least the property of the several local municipalities. The council might have remedied the matter by refunding the money—the simplest remedy—or it might have appropriated the fund towards repayment of the county debt—a common burden (see sec. 422)—or it might, while the county remained intact, have applied it in reduction of future county taxes payable by the local municipalities—also a common burden. But it could not lawfully have applied the fund for other than a county purpose in which all the local municipalities were interested, and in which all were presumably at least to be benefited. It could not, for instance, have legally voted to apply the fund in relief in these matters of all the local municipalities except the town of Woodstock, which is really what the defendants' contention amounts to: see *Attorney-General v. Mayor, etc., of Newcastle-upon-Tyne and North-Eastern R.W. Co.* (1889), 23 Q.B.D. 492, and [1892] A.C. 568. And a threatened misapplication would have been re-

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strained by injunction: *Attorney-General v. Aspinall* (1837), 2 My. & Cr. 613; see also *Attorney-General v. Corporation of Blackburn* (1887), 57 L.T.R. 385.

The doctrine of trusts has many times been applied in the case of municipal corporations intrusted with the collection and expenditure of rates. I referred to a few of the cases in *Patchell v. Raikes* (1904), 7 O.L.R. 470, at p. 477. In one of the cases there referred to, *Attorney-General v. Belfast Corporation* (1855), 4 Ir. Ch. 119, Brady, L.C., says (p. 142): "Municipal corporations are now mere functionary institutions—trustees of public funds, constituted by Act of Parliament; and they have no property except what is intrusted to them, or to their governing bodies, for public purposes. Prior to the Municipal Act, corporations of boroughs stood in a very different position from what they now occupy—unless where there was some special fund intrusted to them for charitable purposes, or when the corporations themselves came forward to complain of a fraud practised in the management of their affairs. Except in such cases, their estates were their own, just as the estate of a private individual is his own—and they dealt with them very much in the same manner as he might have done. It was therefore difficult, if not impossible, to reach any act which, in a moral sense at least, might have been called an improper dealing by a corporation. But all that is changed and gone since the passing of the 3 & 4 Vict. ch. 108; and now municipal corporations are bodies intrusted by their fellow-citizens, the burgesses at large, with the management of their common affairs, with the care and supervision of them, and with the discharge of all the functions attached to them, and with the execution of all the trusts which the Legislature imposes and requires. As I have already said, such corporations are at present mere trustees of the public funds placed in their keeping; and they are liable, as trustees, to be called to account in this Court, in like manner as the trustees of any charitable fund previously were, and still are. Nothing, I apprehend, can be better established than that . . ." And he then refers in support of these statements to a number of cases which I need not cite from the report.

This statement of the law, which I adopt, in my opinion justifies the plaintiffs' contention that, without any special provision in the Municipal Act upon the subject, the defendants were trustees of the fund in question for the various local municipalities who had been

made to contribute to it, to the extent of their several contributions. And, no legal appropriation of the fund having been made, it should have been taken into account, and the plaintiffs' share therein allowed, in the settlement consummated by the agreement of the 10th February, 1902, before referred to. It seems to follow that the settlement then arrived at cannot, under the circumstances, be allowed to stand, but must be opened up, unless the parties can agree upon the extent of the relief to which the plaintiffs are entitled, apart from the agreement, which covers so many matters not in dispute.

The defence of the Statute of Limitations, the only other defence upon which the defendants relied, before us, in my opinion fails. The plaintiffs' claim is not a mere money demand, but an equitable claim, to which the statute would only apply from the time of the discovery, without laches, of the mistake or omission. See *Brooks-bank v. Smith* (1836), 2 Y. & C. Ex. 58, explained in *Baker v. Courage & Co.*, [1910] 1 K.B. 56. The discovery was not made until long after the agreement was made; the exact time does not, I think, appear, but it was well within the period of six years before the action began. And, as even the gentlemen who acted for the defendants in arranging the settlement admitted total ignorance of the existence of the fund, the plaintiffs, with much less means of knowledge, may well be absolved from carelessness in not sooner becoming aware of the facts.

For these reasons I think the appeal should be allowed and the plaintiffs have judgment for the relief prayed, with costs.

MACLAREN, J.A. (dissenting):—This is an appeal by the City of Woodstock against the judgment of Mulock, C.J., dismissing their action against the County of Oxford. The facts are not in dispute; it is a pure question of law. Prior to 1901 the town of Woodstock was one of the local municipalities of the county of Oxford, not separated from the county. The inhabitants of the town were desirous of its becoming a city, but, not having the required population of 15,000, it could not be erected into a city by proclamation of the Lieutenant-Governor under sec. 21 of the Municipal Act. A vote was taken on the question at the municipal election in January, 1901, which was favourable, and application was made to the Legislature, which passed an Act, 1 Edw. VII.

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ch. 75, erecting the town into a city, to take effect on the 1st July, 1901.

Section 4 provided that the city was in all matters to stand in the place and stead of the town, and all property, rights, interests, assets, effects, etc., of the town were to pass to and belong to the new city.

Section 6 is important, and reads as follows: "The provisions of the Municipal Act relating to matters consequent on the formation of new municipal corporations and the other provisions of the Municipal Act aforesaid shall, except in so far as is herein otherwise provided, apply to the said Corporation of the City of Woodstock in the same manner as if the said town had been erected into a city under the provisions of the Municipal Act."

In order to adjust the financial relations of the new city and the county, each of their councils appointed three of their number to negotiate the terms, and the result was an agreement, which was duly executed by the proper officers of each, thereto authorised by by-laws of their respective councils, and which bears date the 10th February, 1902. This agreement provided, *inter alia*, that the City of Woodstock should pay to the County of Oxford, annually for a term of years, a certain sum as its proportionate share of the debts of the county.

About the year 1905 the officials of the city learned that when it was incorporated as a city in 1901, there was a cash surplus of about \$37,000 in the treasury of the county which had not been disclosed to their committee who made the financial adjustments embodied in the agreement of the 10th February, 1902, and which was not deducted from the debts of the county before apportioning its proper share or proportion to the new city. In order to obtain their proportionate share of this surplus, or a re-adjustment of the amounts they were to pay towards the county debts, the present action was brought.

The learned trial Judge held that under sec. 408 of the Municipal Act the surplus in question formed part of the general fund of the county, and was at the disposal of the county council, because not otherwise specially appropriated; and that the Municipal Act does not entitle a minor municipality to maintain an action against the county to recover a share of the county moneys.

The counsel for the respondents before us opposed the appeal

on the grounds taken by the learned trial Judge, and also on the ground that under sec. 27 (2) of the Municipal Act, R.S.O. 1897, ch. 223, as amended by the Municipal Amendment Act of 1900 (63 Vict. ch. 33, sec. 2), which was the law in force in 1901, when the separation took place, no town separating from a county could be allowed the value of any interest it might have in any county property, unless the county council passed a by-law ratifying and confirming the by-law of the town withdrawing from the county.

It is a sufficient answer to this last argument to say that this was not the case of a town withdrawing from a county and becoming a separated town, and that the town passed no by-law withdrawing from the county which the county council should or could ratify or confirm. It was a case of a town becoming a city, which, if it had a population of over 15,000, could have been effected by a proclamation of the Lieutenant-Governor, in accordance with sec. 21 of the Municipal Act; but, inasmuch as it had not such a population, an Act of the Legislature was necessary, which was obtained (1 Edw. VII. ch. 75). Section 6 of this Act, above quoted, provides that the provisions of the Municipal Act shall apply to the new city as if it had been erected into a city under the Municipal Act, that is, under sec. 21, so that this section would apply, and not sec. 27.

The part of sec. 21 applicable to the erection of a town into a city by proclamation is sub-sec. 3, which reads as follows: "In case the application is for the erection of a town into a city, the town shall also pay to the county of which it forms part, such portion, if any, of the debts of the county as is just; or the council of the town shall agree with the council of the county as to the amount to be so paid, with interest from the time of the erection of the new city, and as to the periods of payment; or, in case of disagreement, the same shall be determined by arbitration under this Act; and upon the council proving to the Lieutenant-Governor in Council the payment, agreement or arbitration, the Lieutenant-Governor may, by proclamation, erect the town into a city, by a name to be given thereto in the proclamation."

The erection of the city in this case being effected by the Act, no proclamation was necessary, and the parties made their agreement as to financial and other arrangements after instead of before the separation.

It is not disputed that the surplus of \$37,000 was not taken into

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account in arriving at what the liabilities or debts of the county amounted to, or in determining what portion of such debts it would be just that the city should pay, to use the language of sec. 21.

In giving evidence at the trial one of the Woodstock committee testified that during the negotiations one of the county committee had assured them that the county had not a surplus but a deficit, and he expected the city would receive a bill for its share. All the members of the county committee denied that they had made such a statement, or that they had heard it made, and said that they were not aware at the time whether there was a surplus or not, and the trial Judge gave credence to their denial.

This would be conclusive as to the charge of fraud that was then being pressed, but it is also conclusive that this item of \$37,000 was not taken into account in ascertaining what the debts of the county amounted to at the time of the erection of the city. Does the word "debts" in sec. 21 mean the gross debts of the county, or does it mean the net debts after deduction of the moneys on hand that had been set apart for or were properly applicable to such debts? For instance, if the county had a debenture debt of \$500,000 and a sinking fund of \$250,000, should the town be called upon to pay its proportionate share of \$500,000 or only of \$250,000? Or if, from over-taxation of the whole county, there had accumulated, as here, a surplus of \$37,000, in estimating the share of Woodstock should they have first deducted this surplus, or might they retain this sum, and after the separation apply it exclusively for the benefit of the remaining municipalities or some of them? In my opinion, the latter is not the proper meaning of sec. 21. The existence of this fund was exclusively within the knowledge of the defendants, and I think it should have been disclosed, and, not having been disclosed or dealt with in any way, it may now be dealt with and justice done.

If the matter had been referred to arbitration under the Act, and the existence of this fund to which the Town of Woodstock had materially contributed, and in which it was interested, had been concealed from the arbitrators, relief would have been granted under the principles laid down as to an arbitration under a somewhat analogous statute in *Re Corporations of St. Catharines and Lincoln* (1881), 46 U.C.R. 425, at p. 430. See also Russell on Arbitration and Award, 9th ed., p. 332; *Ingram v. Milnes* (1807), 8 East 445; *Mitchell v. Staveley* (1812), 16 East 58.

I cannot see how the just share of the city in the debts of the county could be determined without taking into account this surplus of \$37,000, which was at the time in the county treasury, unappropriated and available for the payment of the debts of the county *pro tanto*. The language of the statute is very broad, and I do not think that it should be narrowed by any technical construction that would work such an injustice as to divert these moneys which had been in part contributed by the town, and in which they were fairly and equitably entitled to share.

As to the length of time that elapsed before the institution of the present action, there is no evidence that the city was aware of the fact of the surplus until the county undertook to distribute it, and, inasmuch as the county did not disclose the fact, when I think it should have done so, I do not think the city should be barred by any period short of that fixed by the Statute of Limitations, which had not run if the city could not have brought an action before the agreement, as I think would be the case.

I am consequently of the opinion that the appeal should be allowed. If the principle is admitted, the parties will probably find no difficulty in agreeing upon the amount that should have been allowed to the plaintiffs if the surplus had been disclosed and taken into account in making the agreement of the 10th February, 1902. If they cannot agree, it may be determined by arbitration under the Municipal Act, as pointed out in sec. 21.

Appeal dismissed with costs; GARROW and MACLAREN, JJ.A., dissenting.

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[IN THE COURT OF APPEAL.]

C. A. BROOKS-SANFORD CO. V. THEODORE TELIER CONSTRUCTION CO.

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Oct. 22.

Mechanics' Liens—Material-man—Preservation of Lien—Last Delivery—Articles Used for Temporary Purpose—Contract—Registry of Lien—Time—Mechanics' and Wage-Earners' Lien Act, sec. 4—“Furnishes any Materials to be Used.”

Under sec. 4 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, ch. 153, it is not enough that the materials are furnished to be used upon or in the building—the lien attaches only in virtue of materials furnished to be used in the making, constructing, erecting, fitting, altering, improving or repairing the erection or building. The significance of the term “furnishes any materials to be used” is that, unless the materials are furnished by the material-man for the purpose of being used in the building or other work, they cannot be the subject of a lien, even though used.

Where the plaintiffs had contracted to supply the hardware for use in the construction of a building, and the last delivery upon which they relied for preservation of their lien—the registry of the claim of lien being within thirty days of that delivery, but more than thirty days after the last previous delivery of materials—was of certain bolts, of trifling value and used for a temporary or experimental purpose only:—

Held, that these articles were not furnished in such manner as to enable the plaintiffs to claim a lien for their price upon the land of the owners, within the meaning of the Act; and so the whole claim fell to the ground.

Judgment of a Divisional Court, 20 O.L.R. 303, reversed.

Appeal by the defendants Leo Frankel and Frankel Brothers from the judgment of a Divisional Court, 20 O.L.R. 303, reversing the judgment or decision of an Official Referee, and allowing the claim of the plaintiffs to a lien for materials supplied, under the Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, ch. 153.

September 27. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., and RIDDELL, J.

George Wilkie and E. W. Wright, for the appellants. The plaintiffs' case rests entirely on the item of 84 cents for expansion bolts supplied on the 1st April, 1908, to the contractors, the defendants the Theodore Telier Construction Co. The bolts were used in connection with a model for a contrivance which, as the plaintiffs suggested, might be used for elevator gates. The original contract never contemplated the use of such a contrivance, and it was not intended that the model should remain a part of the building. There is, therefore, no right of lien for the price of the bolts, as there was no “sum justly owing” by the owner in respect of them, within the meaning of sec. 4 of the Mechanics' and Wage-Earners' Lien Act. Even if the plaintiffs were entitled to a lien in respect of these articles, it was limited in amount to the price

to be paid for them, as for materials outside of the original contract, under which the time for registration of the lien had expired before the delivery of the articles in question: *Rathbone v. Michael* (1909), 19 O.L.R. 428. A further answer to the plaintiffs' claim, as regards the greater part of its amount, is found in the fact that they obtained a promissory note from the contractors, and discounted it with their bank, thereby losing their right of lien to that extent. Section 28 of the Act saves the lien, where security has been taken for the claim, or a promissory note accepted for it, but does not cover a case in which, as here, the note has been discounted: *Edmonds v. Tiernan* (1892), 21 S.C.R. 406; *National Supply Co. v. Horrobin* (1906), 4 W.L.R. 570.

R. G. Smythe, for the plaintiffs. There was one entire contract between the appellants and the contractors, under which the latter were bound to provide safety gates for the elevator, the material and workmanship of which should comply in all respects with the building laws, city regulations, and directions of the city inspectors. The expansion bolts in respect of which the lien is claimed were purchased for the purpose of completing the contract, and it was not necessary that they should be actually incorporated with the building: *Larkin v. Larkin* (1900), 32 O.R. 80; Wallace's *Mechanics' Lien Laws in Canada*, p. 78, citing *McArthur v. Dewar* (1885), 3 Man. L.R. 72, 79. The law in this respect is different from what it was when *Bunting v. Bell* (1876), 23 Gr. 584, 588, was decided. See also Am. & Eng. Encyc. of Law, 2nd ed., vol. 20, pp. 348, 361. The appellants were also bound by their consent to the purchase of these articles, as shewn by the evidence, whether they were intended for permanent use or not. On the question of the validity of a prevenient general arrangement such as would include the articles in question as being furnished under the original contract, I refer to *Morris v. Tharle* (1893), 24 O.R. 159. *Rathbone v. Michael* does not apply to the present case, as is pointed out by Latchford, J., in the Court below, in this case, 20 O.L.R. 303, at p. 305. As to the defence based upon the negotiation of the note, it is submitted that *Edmonds v. Tiernan* is not a binding authority in this Province, and that sec. 28 of our Act is wide enough to justify the position taken by the respondents, who had no intention of waiving their right to a lien by taking the note, which was returned and in their hands before the expira-

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tion of the period within which they had a right to register the lien: see 27 Cyc. 262, 263; Holmested's Mechanics' Lien Acts, ed. of 1899, p. 134; also the cases cited by Latchford, J., in his judgment in 20 O.L.R. at pp. 306-308; and *In re J. Defries & Sons Limited*, [1909] 2 Ch. 423, 429.

Wilkie, in reply, referred to *Ludlam-Ainslie Lumber Co. v. Fallis* (1909), 19 O.L.R. 419, and to Wallace (*op. cit.*), p. 79, as to the test to be applied in such cases.

October 22. Moss, C.J.O.:—The plaintiffs claim a lien under the Act upon certain lands, the property of the appellants, for materials supplied to the defendants the Theodore Telier Construction Co., who were the contractors for the erection of a building upon the appellants' land. Under the contract, which bears date the 10th April, 1907, the construction company were to complete the building ready and fit for occupation by the 1st October, 1907. They failed to complete within the time limited, and the appellants were only able to enter into occupation during the first week in January, 1908, there then remaining some comparatively trifling matters to be attended to in order to complete. The construction company were dealing with the plaintiffs for materials for use in connection with the contract in question and other building contracts. They also procured some working tools from the plaintiffs, and some items of this character appear in the account kept by the plaintiffs with the construction company in connection with the building upon the appellants' land.

The plaintiffs registered their claim of lien against the appellants' land on the 30th April, 1908. They claimed \$325.92, as shewn in the itemized account. The two last items in the account are, "March 7, 1908, \$1.40," "April 1, 1908, \$0.84." The first of these (\$1.40) appears to have been for tools, and was properly disallowed as an item in respect of which no lien could be claimed; but, assuming it to have been a proper item, the tools were not furnished within thirty days preceding the registration of the claim of lien. The only item, therefore, which appears to bring the account within the terms of the Act so as to entitle the plaintiffs to a lien is the item of 84 cents under date of the 1st April. It is conceded that, unless this item has that effect, the plaintiffs had no right of lien on the 30th April. Their claim depends upon the slender thread

of these 84 cents. And it is also conceded, and rightly so, that, unless the articles representing the 84 cents were of such a character and were so furnished or supplied as to give rise to a lien in themselves, they cannot revive the claim in respect of the remainder of the account. The articles furnished on the 1st April are said to be four coach-screws or expansion balls and four expansion shields. They were not in any way contemplated as things to be procured for the purposes of the work to be done under the contract, nor were they procured for the purpose of being put into the building, and they do not now form part of the material of the structure. The occasion for them arose by reason of a question between the construction company and the appellants as to the absence of safety-gates to the elevator which the construction company had placed or caused to be placed in the building. The appellants contended that the contract and specifications called for safety-gates which had not been supplied. The construction company, while disputing their liability, suggested that they would endeavour to place an arm or similar device which they thought would answer the same purpose as the safety-gates. The appellants doubted this, but informed the construction company that, if they could demonstrate to the satisfaction of the city authorities, as well as to that of the appellant Leo Frankel, that a proper substitute could be attached, they would accept it. The construction company thereupon proceeded to experiment with a view to ascertaining whether their proposed substitute would work, but, after several trials and attempts, abandoned the idea. The articles in question were procured by the construction company for the purpose of making the experiments, but, as the assistant-manager of the construction company testified, they were never intended to be used except for the purpose of experimenting. The experiments having been tried and failed, they were put aside.

Were they, under the circumstances, materials in respect of which the plaintiffs could claim a lien upon the appellants' land?

It is to be borne in mind that these articles were supplied to and upon the credit of the construction company, and that the appellants had nothing to do with their procurement. Their only connection with them was that they were brought to their premises for the purpose of a demonstration, which came to nought. So far as they were concerned, these articles stood in no higher position than tools or implements used by workmen in their trades.

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In *Bunting v. Bell*, 23 Gr. 584, Proudfoot, V.-C., dealing with a claim presented under the Mechanics' Lien Act then in force, drew a sharp distinction between the cases of persons furnishing materials to contractors and persons furnishing materials to the owner of the lands for use in or upon a building. He said (p. 588): "Many cases are cited by Mr. Phillips in which the lien, for materials furnished for, but not used in the building, was enforced even against other lien-holders, and against the owners who had not purchased them. But it seems to me unreasonable and unjust to give the person furnishing such materials, which have not gone to increase the value of the land, a right to payment out of the property of others which had increased the value, or against the owner who had made no bargain for the purchase of them, and whose property was not benefited by them."

These views seem fair and reasonable and such as should govern in the consideration of the respective rights of material-men and owners under the present law. While the object and the policy of these Acts is to prevent an owner from obtaining the benefit of the labour and capital of others without compensation, it is not the intention to compel him to pay his contractor's indebtedness for that which does not go into or benefit his property. Suppose, for instance, that a contractor for the erection of a brick building, thinking in good faith that he will need a certain quantity of bricks, procures that quantity to be furnished, but ultimately finds that he has overestimated, and that, after completion of the building, a considerable quantity remains unused because not required, and causes them to be taken away and uses them for some other purpose. Could it be successfully maintained that the person supplying the bricks to the contractor is entitled to a lien upon the land of the owner of the building for the whole quantity supplied? No decision has been cited, nor have I seen any, which goes the length of upholding such a proposition. The question is glanced at by Killam, J., in *McArthur v. Dewar*, 3 Man. L.R. 72, at p. 79, but the actual decision was based upon the special terms of the contract.

In *Larkin v. Larkin*, 32 O.R. 80, the materials in question were supplied to the owner of the land, and not to a contractor or builder, and the question under consideration was whether, the materials having been removed from the land and not incorporated

in the building, it could be said that the selling value of the land was increased by the furnishing or placing of the materials so as to give the person furnishing them a lien in priority to a mortgagee of the premises. As against the owner the case was as stated by Proudfoot, V.-C., in *Bunting v. Bell* (*supra*), and the only question was whether the lien also took effect as against the mortgagee. And any expressions of the learned Judges should be understood as applicable only to the facts of the case before them.

The often-quoted language of sec. 4 of the Act is made applicable to a variety of persons, as well as a variety of acts and circumstances: “. . . any person who performs any work or service . . . or places or furnishes any materials to be used in the making, constructing, erecting . . . of any erection, building . . . or the appurtenances to any of them, for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building . . . or upon or in respect of which the said work or service is performed, or upon which such materials are placed, or furnished to be used, limited however in amount to the sum justly due to the person entitled to the lien and to the sum justly owing . . . by the owner.” It is capable of being read distributively, and I think was so intended. The land of an owner may and in general should be subject to a lien for materials supplied or furnished to him to be used in the construction, etc., of a building, whether actually used or not; his land may and in general ought to be subject to a lien for materials furnished or supplied to a contractor to be used in the construction of a building when actually used; and so as regards a sub-contractor; but in these cases limited by the sum justly owing by the owner to the contractor. The significance of the term “furnishes any materials to be used” is that, unless the material is furnished by the material-man for the purpose of being used in the building or other work, it cannot be the subject of a lien, even though used.

In my opinion, the articles costing 84 cents supplied by the plaintiffs to the construction company on the 1st April, 1908, were not furnished in such manner as to enable the plaintiffs to claim a lien for their price upon the appellants' land, within the meaning of the Act. And therefore the whole claim falls to the ground.

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This being so, it is unnecessary to discuss the other branch of the case.

I would allow the appeal and restore the judgment or decision of the Official Referee, with costs throughout.

GARROW and MACLAREN, JJ.A., agreed.

RIDDELL, J.:—There being no lien at the common law in favour of one who supplies materials for use in building, the claim of the respondent rests solely upon the statute R.S.O. 1897, ch. 153; and, to succeed, he must bring himself within the meaning of that statute.

The error into which, as with the utmost respect it seems to me, the Court appealed from has fallen, arises from what I think is an unjustifiable extension of the meaning to be attached to the wording of the statute. Section 4 provides that "any person . . . who places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building . . . for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such . . . materials upon the erection, building . . . and the lands occupied thereby or enjoyed therewith . . . or upon which such materials are placed, or furnished to be used. . . ."

The Chancellor considers that the lien attaches for materials "so long as they go to or go into or are furnished to be used upon the structure"—Mr. Justice Latchford says the materials "were 'furnished to be used' in the building . . . and were actually used therein, . . ." and considers that "a lien attaches under sec. 4 of the Act."

It will, however, be seen that the words used in the statute are not so broad, and that it is not enough that the materials are furnished to be used upon or in the building—the lien attaches only in virtue of materials furnished to be used in the making, constructing, erecting, fitting, altering, improving or repairing the erection or building.

Unless the materials furnished on the 1st April, 1908, come within this category, admittedly the lien had lapsed before claim filed.

The facts are fairly clear. The Telier company were erecting a building for Frankel under a written contract, which provided

for an elevator—the Telier company gave a sub-contract to Turnbull, who put in the elevator, but without safety-gates. Frankel claimed that the contract called for such gates, but this was disputed by Telier—the elevator shaft was too small for safety-gates to be put on it, and Telier suggested that he would make an effort to make some device that would be satisfactory to Frankel and the city authorities, then he would demonstrate this device to Frankel and the city inspectors—and so give a satisfactory substitute for the safety-gates desiderated. The substitute proposed was an arm attached to the building. It was intended that Frankel and the city authorities were to be satisfied by experiment of the practicability of the proposed substitute, and, upon their being so satisfied, an arm was to be installed on the plan which had been thus demonstrated experimentally. Frankel agreed to this suggestion. A number of experiments were made in this view; and it was to make these experiments that the materials supplied on the 1st April were procured. The materials were used in the experiment, but were not permanently attached to the building, nor was it intended that they should be.

I cannot see that these materials were “used in the making, constructing, erecting, fitting, altering, improving, or repairing of” the building—although, no doubt, the materials were used upon and in the building. And it cannot be enough that the dealer intends that the materials are to be used in the manner mentioned in the Act—otherwise a fraudulent contractor could by affecting to buy materials for a certain building, although the materials were intended by him for quite another purpose, give a dealer a lien upon property the owner of which had nothing to do with the real object for which the materials were procured.

Whatever may have been the intention of the respondents, it cannot be said that the materials were furnished for any other than the experimental purpose already spoken of—and this is not, in my opinion, within the Act.

In this view of the law, it becomes unnecessary to express any opinion upon the effect of the negotiation of the note given for part of the debt—the new statute 10 Edw. VII. ch. 69, by sec. 28 will prevent any such question being raised in the future.

I am of opinion that the judgment appealed from should be reversed, and the judgment of the Official Referee restored, with costs here and below.

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MEREDITH, J.A.:—I have had the advantage of reading the judgment prepared by Mr. Justice Riddell, and desire to express my agreement with him in the conclusion which he has reached and in his reasons for that conclusion; and I have this only to add: the Act was not passed with the object of making owners pay for things not contracted for by them, and of which they have not had the benefit, but was passed with the object of securing and making available, as far as possible, to those best entitled to it, the money which the owners have contracted to pay and for which they have received value; an object which ought to be borne in mind in the interpretation of any of the provisions of the enactment. In this case the owner neither contracted for, nor got, the bolts in question.

Appeal allowed.

[IN THE COURT OF APPEAL.]

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Oct. 22.

TREASURER OF THE PROVINCE OF ONTARIO V. PATTIN.

Succession Duty—Property of Person Resident in Ontario at Time of Death—Mortgages on Foreign Lands—Specialties—Domicile—Situs of Debts—Succession Duty Act, sec. 4 (1) (a).

The estate of P., who, at the time of his death, was resident in the Province of Ontario, was held (GARROW, J.A., dissenting, and MACLAREN, J.A., doubting), liable to succession duty in respect of a large number of mortgages upon real estate situate in the State of Michigan, made in favour of P., and executed by mortgagors who were, at the respective dates of the instruments and the mortgagee's death, resident in Michigan.

Commissioner of Stamps v. Hope, [1891] A.C. 476, followed.

Judgment of the Judge of the Surrogate Court of the County of Essex affirmed.

Per Moss, C.J.O.:—The evidence shewed that by the law of Michigan the mortgages were in fact or were to be deemed as in fact instruments under seal creating debts by specialty, and not merely simple contract debts. At the time of P.'s death the mortgages were in his custody in Ontario. Thus, by the artificial rule of law, they were *bona notabilia* in Ontario, and, as such, were subject to be, and were in fact, comprised in the list of properties held by the personal representative upon his application for letters in Ontario. Had the instruments been located in Michigan or anywhere out of Ontario at the time of the testator's death, it is quite probable that the rule laid down by the Judicial Committee in *Woodruff v. Attorney-General*, [1908] A.C. 503, would prevail.

Per MEREDITH, J.A.:—Such of the debts as were specialties, that is, those in which the debtor had, in the mortgage security, covenanted to pay, were within Ontario, and taxable, because in Ontario at the time of the testator's death; but such as could be sued for on the simple contracts only were without Ontario, and not taxable there, because the debtors resided out of the Province.

Per GARROW, J.A.—P. had not at his death lost his domicile of origin in the State of Michigan, nor acquired a new domicile of choice in Ontario; the tax in question must fall, if at all, within the part of sec. 4 (1) (a) of the Succession Duty Act which imposes a tax upon the property in Ontario of a person "domiciled in Ontario . . . or . . . elsewhere;" and the mortgages in question were not by anything contained in the statute withdrawn from the operation of the maxim *mobilia sequuntur personam*, attracting and attaching to it the foreign domicile of the testator, and were not in fact or in law "property situate within this Province," within the meaning of that expression in the statute.

AN appeal by Frank L. Pattin, the administrator of the estate of John H. Pattin, deceased, from the judgment of the Judge of the Surrogate Court of the County of Essex, under sec. 8 of the Succession Duty Act, holding and determining that certain mortgages of lands situated in the State of Michigan, made by mortgage debtors residing in that State, the property of the deceased, were liable to duty under the Act.

November 24, 1909. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A.

F. D. Davis, for the appellant. The property of the late John H. Pattin, consisting of mortgages upon lands situate in the State of Michigan, is not taxable under the Succession Duty Act and amendments, including 5 Edw. VII. ch. 6. Under sec. 4 (1) (a), as enacted by 5 Edw. VII ch. 6, the only property outside of the Province which is assumed to be taxed is movable or personal property locally situate out of the Province, where the owner was domiciled in the Province at the time of his death. It is submitted that mortgages on lands are real estate. Under the Ontario Wills Act "real estate" is defined, in sec. 9, as including mortgage securities on lands. The Wills Act is *in pari materiâ* with the Succession Duty Act. "Real estate" must receive the same meaning in both Acts. The definition of "real estate" given in the Century Dictionary includes an estate held by way of mortgage. The property is the estate in the lands themselves. For the purpose of international law mortgages on lands are immovable or real property, the title to which is governed by the law of the State where the lands are situate: Westlake on Private International Law, 3rd ed., pp. 189, 190. The property sought to be taxed in this case, namely, the mortgages, is property locally situate out of Ontario, in the State of Michigan: *Walsh v. The Queen*, [1894] A.C. 144, 148; *Henty v. The Queen*, [1896] A.C. 567, 574; *Blackwood v. The Queen* (1882), 8 App. Cas. 82; *In re Clark*, *McKecknie v. Clark*, [1904] 1 Ch. 294; *Guthrie v.*

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Walrond (1883), 22 Ch. D. 573. The mortgage instruments are not in themselves property in any sense; they are only evidences of property. The only reasonable rule applicable to determine the location of property in a case of this kind is, "Where can such property be most conveniently reduced into possession by the administrator?" That is, in this case, in Michigan. There is no merger of the simple contract debts in the mortgages. There is no reason for the difference between specialty and simple contract debts. Neither can be enforced except by action: *Attorney-General of Ontario v. Newman* (1901), 1 O.L.R. 511. The Legislature of Ontario has no jurisdiction under the B.N.A. Act to tax property out of the Province: *Woodruff v. Attorney-General for Ontario*, [1908] A.C. 508. The right of the legatees and the residuary devisees to share in the Michigan property is a civil right existing at the place of their domicile, and, under the B.N.A. Act, sec. 92, sub-secs. 2 and 13, the Legislature of Ontario has no jurisdiction to interfere with such right. The evidence shews that the domicile of the testator was Michigan: *Moorhouse v. Lord* (1863), 10 H.L.C. 272; *Marchioness of Huntly v. Gaskell*, [1906] A.C. 56; *Falls v. Bank of Montreal* (1902), 1 O.W.R. 538. In like circumstances, the tax would be collected here in Ontario. See the Succession Duty Act, 9 Edw. VII. ch. 12, sec. 7 (2).

J. R. Cartwright, K.C., *J. W. Hanna*, K.C., and *J. B. McLeod*, for the Treasurer. The deceased was at the time of his death domiciled in Windsor, Ontario. The facts disclosed in evidence shew this. See Phillimore on Domicile, p. 11; *Platt v. Attorney-General of New South Wales* (1878), 3 App. Cas. 336, 343; *Marchioness of Huntly v. Gaskell*, [1906] A.C. 56; *Winans v. Attorney-General*, [1904] A.C. 287; *Bell v. Kennedy* (1868), L.R. 1 H.L. Sc. 307, at p. 319; *Lambe v. Manuel* (1900), Q.R. 18 S.C. 184, affirmed in [1903] A.C. 68; Dicey's Conflict of Laws, 2nd ed., pp. 110 and 111; Jacobs on Domicile, p. 210; *Douglas v. Douglas* (1871), L.R. 12 Eq. 617. These mortgages are specialties, and, as they were in the possession of the testator at the time of his death in Windsor, they are property in Ontario, and are taxable: *Commissioner of Stamps v. Hope*, [1891] A.C. 476; Hanson on Estate Legacy Succession and Probate Duties, 5th ed., p. 270; *Winans v. The King*, [1908] 1 K.B. 1022, at p. 1030. The question whether a debt is a specialty is decided by the law of the testator's domicile, and not by the *lex loci*: *Payne*

v. *The King*, [1902] A.C. 552. A mortgage is not land or an interest in land. It is a personal contract for a debt secured by an estate, and in equity the estate is no more than a pledge or security for the debt. The debt is the principal; the estate is the accident: Fisher's Law of Mortgages, 5th ed., secs. 707 to 711; Stroud's Judicial Dictionary, 2nd ed., vol. 2, p. 1226. It is so treated in the Act respecting the Law and Transfer of Property, R.S.O. 1897, ch. 119, sec. 1, sub-sec. 2, and in the Act respecting Mortgages of Real Estate, R.S.O. 1897, ch. 121, sec. 1, sub-sec. 4. See sec. 8 (4 (1) (a)) of the Act to Amend the Succession Duty Act, 5 Edw. VII. ch. 6, for property on which succession duty is payable. The Province has the right to tax property situate in Ontario, notwithstanding that the legatees named in the will are foreigners and domiciled abroad: *In re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351, at p. 356; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Attorney-General of Ontario v. Newman* (1899), 31 O.R. 340, at p. 347; *Lovitt v. Attorney-General for Nova Scotia* (1903), 33 S.C.R. 350. This case is stronger even than the *Hope* case, in that in the latter there was a clause in the deed declaring that there should be no merger of the debts created by the promissory notes. Here there is no such stipulation in the mortgages, and there can be no doubt of merger.

Davis, in reply. The case of *Lambe v. Manuel* does not apply, as the Quebec statute is different from the Ontario Act in force at the time of the death.

October 22. Moss, C.J.O.:—The question raised upon this appeal, while comparatively simple in statement and in regard to the facts, is not altogether free from difficulty. It is whether the estate of the late John H. Pattin, who, at the time of his death, was resident in the city of Windsor, is liable to succession duty in respect of a large number of mortgages upon real estate situate in various parts of the State of Michigan, U.S.A., made in favour of Mr. Pattin, and executed by mortgagors who were, at the respective dates of the instruments and the mortgagee's death, resident in Michigan. No question arises as to the ability of the mortgagors to pay, or as to the value of the securities. Some question was raised as to Mr. Pattin's domicile at the time of his death, but nothing appears to turn specially upon it. The difficulties arise out of the other circumstances.

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Before finally dealing with the appeal, we deemed it desirable to obtain evidence with respect to the nature and effect of the instruments according to the law of the State of Michigan. This was taken before the Judge of the Surrogate Court of Essex on the 28th September, and is now before us.

The effect of the evidence is to shew that by the law of the State of Michigan the mortgages are in fact or are to be deemed as in fact instruments under seal creating debts by specialty. Upon the whole evidence now before us, as well that taken before as after the appeal, and on inspection of the mortgages, sufficient appears to shew that the mode and form of execution of them was such as to render them sealed instruments capable of creating debts by specialty according to the law of this Province: *Hamilton v. Dennis* (1866), 12 Gr. 325; *In re Sandilands* (1871), L.R. 6 C.P. 411 (commented upon in *National Provincial Bank of England v. Jackson* (1886), 33 Ch. D. 1); *Re Bell and Black* (1882), 1 O.R. 125. See also *Thompson v. Skill* (1909), 13 O.W.R. 887. Neither by the law of Michigan nor of this Province are they instruments creating merely simple contract debts. And, although it may be true that the executor or person administering the trusts of the will, in order to collect the debts or to discharge the mortgages, would be obliged, apart from any special directions contained in the will, to obtain ancillary letters in Michigan, yet the rule adopted in *Commissioner of Stamps v. Hope*, [1891] A.C. 476, and virtually adhered to in *Payne v. The King*, [1902] A.C. 552—although in the latter the debt was held to be a simple contract debt in Victoria, while a specialty debt in New South Wales—appears to have application to this case. In the well-considered case of *In the Estate of Sir William John Clarke* (1902), 28 Vict. L.R. 447, at p. 457, Madden, C.J., points out that the decision in *Payne v. The King* adopts a view which forms part of the artificial rule as to *bona notabilia*, though it also consists with the common law general rule that the residence of the debtor is the place at which payment of a simple contract debt may be enforced, and this seems to me to be the correct view.

At the time of Mr. Pattin's death the mortgages were in his custody at Windsor. Thus, by the artificial rule of law, they were *bona notabilia* in this Province, and, as such, were subject to be, and were in fact, comprised in the list of properties held

by the personal representative upon his application for letters in this Province. Had the instruments been located in Michigan or anywhere out of Ontario at the time of the testator's death, it is quite probable that the rule laid down by the Judicial Committee in *Woodruff v. Attorney-General for Ontario*, [1908] A.C. 508, would prevail.

In several of the cases cited it appeared as a fact that the lands comprised in the mortgage securities in question were situated outside of the jurisdiction of the Courts of the place of the deceased mortgagee's residence or domicile, but the decisions do not appear to have in any way turned upon that circumstance. The determining factors seem to be, (a) domicile, or (b) the nature and *situs* of the debt.

In my opinion, the learned Surrogate Judge rightly determined the case. I think that the appeal fails and should be dismissed with costs, except those incurred in taking the additional evidence, as to which there should be no costs.

MACLAREN, J.A.:—When this case was sent back to the Surrogate Judge for further evidence, the inclination of my opinion was that, as it then stood, the Crown had not sufficiently established that the property sought to be taxed was property in Ontario. I cannot say that my opinion has been entirely changed, but I must say that the case is one of great difficulty and of considerable doubt.

I accordingly give a grudging assent to the affirmance of the judgment appealed against.

MEREDITH, J.A.:—It may be that any one ought to be able to find the principles upon which all of the questions involved in this case, or, indeed, in any case that can arise under the legislation in question, may be resolved, plainly enunciated by the Privy Council, as well as by our own Courts, in recent cases, and yet the case seems to me to be beset with considerable difficulty. It is, however, to be hoped that through it, eventually, the way may be lighted so that there can be no difficulty in understanding what the law really is respecting such taxation as that in question, for that is especially needful in a country such as this, in which most of the inhabitants have, or are more or less directly interested in, some taxable, if not also heritable, property.

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In *Woodruff's* case, [1908] A.C. 508, it was held that the taxation then in question, which was under the enactments here in question, was invalid because the property in respect of which the tax was imposed was not "locally situated" within the Province.

In *Blackwood's* case, 8 App. Cas. 82, it was held, merely, that, upon the proper interpretation of the colonial enactment there in question, the taxed property was not within its provisions.

In *Hope's* case, [1891] A.C. 476, it was held that the locality of a specialty debt is attributable to the place where the deed is found at the time of the creditor's death; and it was said that the locality of a simple contract debt is attributable to the place of residence of the debtor, in both cases for the purposes of taxation such as that in question.

And in *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670, the rule that, in all personal actions, the Courts of the country in which the defendant resides, not the Courts of the country in which the cause of action arose, must be resorted to, was firmly adhered to; though it must be added that in this Province, under its legislation, an action may be brought against, and leave may be given to serve the writ out of the jurisdiction upon, a foreign debtor, for breach of contract in the Province, wherever the contract was made, if it were to be performed in the Province; but, if the debtor be without, and have no property within, the Province, that right may be a barren one.

The cases in the United States of America seem to be directly opposed to *Hope's* case; the rule adopted there being apparently based upon the principle that the debtor must seek his creditor and make payment to him, wherever he may be: see Am. & Eng. Encyc. of Law, 2nd ed., vol. 27, p. 348.

The case, in our own Courts, of *Attorney-General of Ontario v. Newman*, 31 O.R. 340, and in appeal, 1 O.L.R. 511, may be referred to. There the rules enunciated in *Hope's* case were intended to be given effect.

The difficulty in regard to *Woodruff's* case is that it gives no definition of the expression "locally situated," nor does the Succession Duty Amendment Act, 1905, from which it may have been taken; and that it seems to take it for granted that the taxation was upon property, not person.

The words of the British North America Act, 1867, which con-

fer, upon the Province, the power to tax, are (sec. 92, sub-sec. 2): "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes." If to that be added the words, "on property locally situated," the words "on property" have a very large restricting effect; but I am unable to perceive any effect produced by the words "locally situated." If property, or person, be within the Province, in the meaning of the enactment, it or he must be "situated" there, and the word "locally" adds nothing. If the words "in fact," as distinguished from "in law," be substituted for "locally situated," the situation is very much cleared; but what authority is there for adding either; why may not direct taxation, within the Province, include person, as well as thing, in law, as well as in fact, within the Province?

With tangible property no difficulty can very well arise under any of these various expressions; and there is no need for the introduction of any legal fiction; "within," in that case, should receive its ordinary, plain, meaning, in fact "within." But, with intangible property, fiction must be resorted to, unless, indeed, it is to be altogether excluded from taxation, a proposition for which no one could reasonably contend. It includes a large proportion of all taxable property.

In *Woodruff's* case it does not clearly appear just what the character of the property was, though it was, no doubt, intangible; nor does it appear, or if it does I have been unable to discover, why it was considered to be "locally situated" out of Ontario. If the "bonds and debentures" were specialties, then, under *Hope's* case, the debts which they represented would, under the "conspicuous" fiction, be where the bonds and debentures were, at the time of the testator's death, that is, at New York, out of this Province; on the other hand, if they represented simple contract debts, the debtors residing out of Ontario, they, according to *Hope's* case, as well as to the rule upon which *Faridkote's* case was decided, would not be within the Province.

My own idea would have been that this question of power to impose a tax would depend upon the actual home of the person or the property taxed; and that that would really be a question of fact to be determined upon a consideration of all the material circumstances and fictions of law bearing upon the question, which in turn were but the result of efforts to determine difficult ques-

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tions of fact. And, so dealing with this case, would have easily come to the conclusion that the real home of the intangible property in question was Windsor, in this Province, where the owner permanently resided, where he carried on the business of money-lending out of which the debts arose, where the debts were to be paid, and where the evidences of the debts were retained, and where, when paid, the promissory notes would have been given up, and the pledges for their due payment would have been released. It was for the very purpose of taking that business, and all his transactions in it, and the property and money invested in it, and all that was to be made out of it, out of the State of Michigan and into the Province of Ontario, that the man left that State and took up his permanent residence in that Province, an act which, coupled with the other acts mentioned, I would have thought had the effect which was the main, if not the only, object of all these acts; the effect of taking his property out of liability to taxation in Michigan and into such liability, which is less, in Ontario.

But this case, in this respect, is, I think, governed by *Hope's* case, and consequently such of the debts as are specialties, that is, those in which the debtor has, in the mortgage security, covenanted to pay, are within Ontario, and taxable, because in Ontario—at the testator's place of residence at Windsor—when he died; but that such as can be sued for on the simple contracts only are without Ontario, and not taxable there, because the debtors reside out of the Province.

I cannot see how *Hope's* case can be said to be inapplicable merely because the covenant to pay happens to be in a mortgage; the debts are none the less specialties. Nothing is, I think, said in that case as to the place where the simple contract debts were payable, but, if anything could be thought to turn upon that, *Faridkote's* case shews that the thought would be erroneous.

As, therefore, according to the authorities, the Province had no power to tax the simple contract debts, it is immaterial what the enactment purports to do. It very clearly taxes the other debts, they being within the Province.

Since writing the foregoing opinion, at the close of the argument, further evidence has been taken as to the nature of the debts, but that evidence was not so pointedly directed to the real question that it can be said to have rendered further evidence un-

necessary, if either party desire it. It may possibly be that all of the mortgages create specialty debts, or that some only of them have that effect. There are but a few of them before us. It may be that the parties can agree as to this, but, if not, the Surrogate Court Judge should consider the question, which does not seem to me to have hitherto been brought to his attention.

GARROW, J.A. (dissenting):—The deceased died on the 18th February, 1907, at the city of Windsor, in Ontario, where he had resided for about seven years.

The Succession Duty Act then in force was R.S.O. 1897, ch. 24, as amended by the Succession Duty Amendment Act, 1905. Section 4 (1) (a), as enacted by the latter statute, provides as the proper subject of duty under the Act: (1) "all property situate within this Province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere;" and (2) "all movable or personal property locally situate out of this Province and any interest therein where the owner was domiciled in this Province at the time of his death, whether such property passes by will or intestacy."

The first question raised upon the appeal is apparently that of the domicile of the deceased. And upon that question I agree with the contention of the appellant, namely, that the deceased had not at his death lost his domicile of origin in the State of Michigan, or, in other words, acquired a new domicile of choice in Ontario. He was originally a citizen of the United States, and had, before his removal to this Province in or about the year 1901, resided for many years in the State of Michigan. He was not engaged in business, but lived upon an income derived from investments, the great bulk of which, at the time of his death, consisted of the mortgages in question. When he first came to Windsor, he resided with his wife in a leased house. Afterwards, about two years before his death, he purchased a house, and resided in it until his death. He did not apply for or become a naturalised British subject, and, although nationality and domicile are not, as has often been pointed out, identical, the circumstance in a search for intention may not be totally unimportant. When he came

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to reside at Windsor, he left behind him a married son. And to this son long visits were made every year. When the wife of the deceased died, she was buried in a family burial plot in the State of Michigan, apparently then acquired for that purpose. And in the same burial plot the deceased was afterwards buried.

By his will he disposed of his whole estate among relatives, all of whom then resided in the United States, many of them, but not all, in the State of Michigan. This will, said to be written in his own handwriting, was witnessed by two witnesses residing in the State of Michigan. Two other residents of the same State are named in it as executors. It was, I assume on the evidence, executed in the State of Michigan. In it is found this paragraph: "And I, John H. Pattin, direct and declare that this will shall be probated in Clinton County, Michigan, regardless of where I may die." The city of Windsor is separated from the city of Detroit, in the State of Michigan, by the river Detroit, over which a ferry plies. No reason is given in the evidence, that I can discover, for the change of residence from the one side of the river to the other, but it was stated in the course of the argument that the real reason was to escape from what the deceased regarded as an obnoxious tax. His son, while in the witness box, was prevented by the ruling of the learned Surrogate Court Judge, improperly I think, from giving in evidence his father's intention as to residence, for such evidence is clearly admissible upon a question of domicile: see *In re Grove* (1888), 40 Ch. D. 216. But, even without such evidence, or evidence of his reason for removing from the city of Detroit to the city of Windsor, I am unable to find in the only one clear circumstance proved, namely, a residence in this Province, under the circumstances which appear and to which I have referred, for about seven years, sufficient to establish the burden which rested upon the Crown: see *Winans v. Attorney-General*, [1904] A.C. 287.

The deceased not having been domiciled within Ontario, the tax in question must fall, if at all, within the part of the section which imposes a tax upon the property in Ontario of a person "domiciled in Ontario . . . or . . . elsewhere." If the property is in Ontario, the residence and domicile may both be in a foreign country. And consequently what has to be determined is, are the mortgages in question, under the circumstances

mentioned, "property situate within this Province," within the meaning of that expression in the statute?

That the mortgages are specialties, I shall on the evidence assume, although, as will appear, I do not regard that circumstance as of vital importance.

The language of the Act seems to point to property actually, that is, physically, in Ontario. By sec. 6, the sheriff may be called on to value the property inserted in the inventory, under sec. 5, by the person who applies for probate or administration. This can scarcely intend that the sheriff shall make a journey to a foreign country, perhaps at the other side of the globe, for the purpose. By sec. 12 a lien is given, a somewhat useless proceeding when the property itself is so situated as to be for all practical purposes beyond the reach of the lienor. And by sec. 15 the executor or administrator is given power to sell the property for the purpose of paying the duty. These provisions all seem to involve the idea of tangible property situated in the Province which can be effectually reached and dealt with here by the executor or administrator. Immovables such as land or interests in land must, of course, be here. A mortgage upon lands is not, however, apparently regarded as an interest in land, but rather as a movable personal chattel, or, in other words, a mere chose in action. The debt is the main thing, the security merely an accessory: see the well-discussed case of *Lawson v. Commissioners of Inland Revenue*, [1896] 2 I.R. 418, in which mortgages on land in a foreign country were held liable to a similar duty in Ireland, where the deceased mortgagee was in his lifetime domiciled.

Much must, of course, depend upon the exact language of the statutes involved in such cases, no two of which are exactly alike, so far as I have seen. Some care must, therefore, I find, be exercised in considering and applying the very numerous cases upon the always perplexing subject of locating, for the purposes of taxation, property which inherently has no physical situs.

In *Attorney-General for Ontario v. Woodruff* (1907), 15 O.L.R. 416, at p. 433, I ventured the opinion that the maxim *mobilia sequuntur personam* applied in such cases in so far as it does not interfere with a proper construction of the statute. I remain of the same opinion, although the judgment of the Privy Council reversed, upon other grounds, the judgment of this Court: see *Woodruff v. Attorney-*

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General for Ontario, [1908] A.C. 508. And this seems also to have been the opinion of the majority of the Court in the very recent case of *Lovitt v. The King* (1910), 43 S.C.R. 106.

The head-note in the *Woodruff* case in the Privy Council is: "It is *ultra vires* the Legislature of Ontario to tax property not within the Province: see British North America Act, 1867, sec. 92, sub-sec. 2:—*Held*, accordingly, that the Succession Duty Act (R.S.O. 1897, ch. 24) does not include within its scope movable properties situated outside the Province of Ontario which it was alleged that the testator, a domiciled inhabitant of the Province, had transferred in his lifetime with intent that the transfers should only take effect after his death. *Blackwood v. Reg.* (1883), 8 App. Cas. 82, followed."

Sub-section 2 of sec. 92 of the British North America Act empowers the local Legislature exclusively to enact laws respecting (2) "direct taxation within the Province in order to the raising of a revenue for Provincial purposes." The effect of the decision is to destroy entirely the validity of so much of sec. 4 (1) (a) of the Act, as amended in 1905, as applies to the foreign movable personal property of a person who dies domiciled in Ontario. And also it appears to me to necessitate such a construction of what remains as shall make it applicable only to property actually and not merely technically within the Province. Otherwise it would be easy for the Legislature to evade the effect of the decision by enacting new laws under which to bring property technically here, which is actually elsewhere beyond its reach.

Under these circumstances, it seems to me that the case cannot be determined by the principle applied in *Commissioner of Stamps v. Hope*, [1891] A.C. 476, which was followed by the learned Surrogate Court Judge, if for no other reason than that in that case the domicile of the deceased mortgagee and the actual situs of the mortgage deed at the time of his death concurred. And it is not unworthy of note that the decision itself has for some reason not been accepted as a universal solvent of similar questions which have since arisen in subsequent cases of equal authority: see *Walsh v. The Queen*, [1894] A.C. 144, at p. 148; *Henty v. The Queen*, [1896] A.C. 567, at p. 574; *Payne v. The King*, [1902] A.C. 552; *Harding v. Commissioners of Stamps for Queensland*, [1898] A.C. 769, at p. 771 (mortgage deeds there shewn to have been in Queens-

land); *Attorney-General v. Lord Sudeley*, [1896] 1 Q.B. 354, *per* Lord Esher, M.R., at p. 362; and *per* Lord Halsbury in the same case, *sub nom. Lord Sudeley v. Attorney-General*, [1897] A.C. 11, at p. 15, concurring with Lord Esher's view that the mortgages there in question were foreign assets.

In the *Woodruff* case, in the Privy Council, the case of *Blackwood v. The Queen*, 8 App. Cas. 82, is commended as in point upon a construction of our statute. That was a decision upon a Victorian statute, if not of precise, at least of similar, import to ours. And what was decided was that the question, should personal property belonging to a person domiciled in the colony of Victoria, which is locally situated outside the colony of Victoria, be held to be liable to duty under the Duties on the Estates of Deceased Persons Statute, 1870, should be resolved in the negative. Sir Arthur Hobhouse, in summing up at p. 97, says: "What their Lordships find is that the Victorian Legislature have imposed a tax payable by an executor, as a condition precedent to the issue and efficacy of the probate necessary for his action, out of the estate while it is in bulk, and before distribution or administration has commenced. All these things, the person to pay, the occasion for payment, the fund for payment, and the time for payment, point to the Victorian assets as the sole subject of the tax. The reasons which led English Courts to confine probate duty to the property directly affected by the probate, notwithstanding the sweeping general words of the statutes which imposed it, apply in full force to this case. . . . Their Lordships think that, in imposing a duty of this nature the Victorian Legislature . . . was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction. And they hold that the general expressions which import the contrary ought to receive the qualification for which the appellant contends, and that the statement of personal property to be made by the executor under sec. 7, sub-sec. 2, of the Act, should be confined to that property which the probate enables him to administer."

The practical result seems to be to make the decisions under the English Probate Duty Acts applicable, for such duties were also collectable only out of the property which the probate enabled the executor to deal with. And, as the more recent Finance Act,

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1894, has been recently interpreted to be in principle the same, although of wider extension, the decisions under that Act would also apply. The most recent case, one of very great authority, is *Winans v. Attorney-General*, [1910] A.C. 27, a decision of the House of Lords. The Court was there dealing with specialties, bonds of a foreign country: *Commissioner of Stamps v. Hope* was cited, but is not referred to in the judgments. That case in its facts comes very near this. The subject-matter was the same, and the situation as to domicile, residence, and death, was identical. What was determined was that the bonds there in question, which, of course, were specialties quite as much as the mortgages in this case are, were subject to the tax. And the older case, also a leading one on the subject, of *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, was approved. What was laid down in the older case and followed in the later one was that probate duty is payable in respect to bonds of foreign governments of which a testator dying in England was the holder at the time of his death, and which have come to the hands of his executor in that country; such bonds being marketable securities within the kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of that kingdom to render the transfer of them valid.

A similar rule was laid down in the case of simple contract obligations by Wright, J., in *Stern v. The Queen*, [1896] 1 Q.B. 211, referred to with approval by Lord Atkinson in the *Winans* case, at p. 39. The facts upon which the *Winans* case proceeded are thus stated at p. 31 of the judgment: "It is not disputed that the bonds are payable to bearer, are marketable in England, are not registered in the name of the deceased, nor is his name mentioned in them, are transferable in England by delivery, and that no act other than delivery need be done in or out of England to complete the title of the transferee. Being physically situated in England at the time of the owner's death, they were subject to English law and the jurisdiction of English Courts, and taxes might therefore *prima facie* be leviable upon them."

The reasoning in all the three cases to which I have last referred essentially and vitally, in my opinion, distinguishes them from the case at bar, and leads to the conclusion that the inquiry cannot always be confined to such narrow compass as the actual locality of the instrument at the owner's death. That is only

one of several elements which must be considered in determining whether or not the "property" is the proper subject of taxation under the statute; a much more important and determining element being, in my opinion—is the property itself represented by the instrument of title so situated as that, in the language of the judgment in the *Blackwood* case, it can be said to be "under the hand" of the Legislature, and to be such as the probate will enable the executor to administer?

In the cases to which I have referred the property clearly was, because it was negotiable by delivery, but that cannot be said of the mortgages here in question. They are not transferable by delivery nor transferable at all effectually in Ontario. No action could be brought here upon them either upon the covenant for payment nor to foreclose or otherwise realise upon the security. And, if payment was voluntarily made, the security must be released and the land reconveyed according to the law of the State of Michigan and not of Ontario. As to them, probate in Ontario would be entirely useless, and probate or some similar process in Michigan absolutely necessary to enable the representative of the deceased owner to administer.

Under all the circumstances, I am of the opinion that the property in question is not by anything contained in the statute withdrawn from the operation of the maxim *mobilia sequuntur personam*, attracting and attaching it to the foreign domicile in the State of Michigan of the testator, and that it is not in fact or in law "property situate within this Province" within the meaning of that expression in the statute.

For these reasons I would allow the appeal.

Appeal dismissed; GARROW, J.A., dissenting.

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[DIVISIONAL COURT.]

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RE RYAN AND TOWN OF ALLISTON.

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Oct. 24.

Municipal Corporations—Local Option By-law—Voting on—Voters' List Certified by County Court Judge—Ontario Voters' Lists Act—Complaint—Notice of Holding Court—Duty of Clerk—Irregularities—Consolidated Municipal Act, 1903, sec. 204.

Held, affirming the decision of MEREDITH, C.J.C.P., 21 O.L.R. 582, that the proper voters' list was used at the voting upon the local option by-law in question; and that other slight irregularities were cured by the application of sec. 204 of the Consolidated Municipal Act, 1903.

Per BOYD, C.:—Assuming that two names were wrongly added to the list by the County Court Judge at a Court of Revision held without the notice made a prerequisite by the Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 17, being given—that did not *per se* vitiate the list, and the error would be so trifling as not to affect the result of the voting.

Per MIDDLETON, J.:—The clerk could not go behind the certificate of the Judge, which was conclusive until quashed or otherwise annulled; and any attack upon it after the voting was too late.

AN appeal by Ryan from the order of MEREDITH, C.J.C.P., 21 O.L.R. 582, dismissing the appellant's motion to quash a local option by-law.

October 20 and 21. The appeal was heard by a Divisional Court composed of BOYD, C., RIDDELL and MIDDLETON, JJ.

J. B. Mackenzie, for the appellant. My first objection to the by-law is that there was no lawful or sufficient voters' list upon which the voting could be carried on. The learned Chief Justice from whose judgment this appeal is taken speaks (21 O.L.R. at p. 584) of "the last *de facto* certified voters' list filed in the office of the Clerk of the Peace," as being "all that the clerk of the municipality is to concern himself with." I do not know what a *de facto* voters' list is, and thought the term was only applicable to persons holding an official position. Notice of the holding of the Court for the revision of the list was not published in a newspaper, as required by the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 17 (4). The omission is fatal to the validity of the by-law: *Hodgins on Voters' Lists*, 2nd ed., p. 51; *Regina v. Court of Revision of Cornwall* (1866), 25 U.C.R. 286; *In re Revision of Voters' Lists of Township of Goderich* (1874), 6 P.R. 213, at pp. 214, 215; *Tobey v. Wilson* (1878), 43 U.C.R. 230, *per* Armour, J., at p. 234, where he says that "the Court of Revision is the creature of the statute constituting it," and at p. 236, where he says that certain provisions

with regard to notice are imperative, that "such notice is the foundation of the jurisdiction of the Court, and, if these provisions have not been complied with, the Court have no authority to deal with the subject-matter of the complaint." It is submitted that the principle of these decisions applies to the case at bar. I refer also to *Re Dale and Township of Blanchard* (1909), 1 O.W.N. 65, in which *Tobey v. Wilson* was approved of, and to the *Prince Edward Case* (1872), H.E.C. 160, and the *Monck Case* (1872), *ib.* 154, the decision in which was submitted to the Queen's Bench by Galt, J. (see 32 U.C.R. 147); also to the judgment of Anglin, J., in *The King ex rel. Black v. Campbell* (1909), 18 O.L.R. 269, which shews that such an irregularity is not cured by the provisions of sec. 204 of the Consolidated Municipal Act.

[Counsel was stopped at this point, as the Court wished to hear counsel for the respondents as to this objection before hearing argument as to others.]

W. A. J. Bell, K.C., for the respondents, argued that under sec. 148 of the Consolidated Municipal Act, 1903, the proper voters' list to be used at an election was the last list certified by the Judge and transmitted to the Clerk of the Peace, as required by that section, and the list actually used at this election complied with those requirements. The Judge had no jurisdiction except as to the one complaint brought before him, and, even if there was an irregularity in holding the Court of Revision, and the two names added by the Judge were wrongly added, that would not affect the result of the election. He referred to *Eastern Division of Clare Case* (1892), 4 O'M. & H. 162, 164. The certification and transmission of the list under sec. 148 was an altogether separate thing from the holding of the Court of Revision, and was not vitiated by irregularities in connection with the latter.

Mackenzie, in reply, referred to *The King v. Justices of Leicester* (1827), 7 B. & C. 6, 12, and to *Robinson v. McQuaid* (1854), 1 P.E.I. Rep. 103, in which it is laid down that "where the initial proceedings necessary to give jurisdiction to a public authority created by statute are not taken as prescribed by the Act, all proceedings founded thereon are void." Reference was also made to *In re McCrae and Village of Brussels* (1904), 8 O.L.R. 156; *Re Ostrom and Township of Sidney* (1888), 15 A.R. 372. Counsel then proceeded to argue that the by-law was void on the ground that all the

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printing in connection with it was done by the head of the respondent corporation. This objection is somewhat similar to, but not identical with that which was overruled in *Re Schumacher and Town of Chesley* (1910), 21 O.L.R. 522, and this case is distinguishable. It was further argued that a number of the councillors were disqualified from acting as such by reason of having subscribed to a local option fund, and also that one of the polling places had been changed improperly, as the by-law by which the change was effected had not been properly signed.

[Counsel for the respondents was not called upon to argue as to these and certain other objections to the validity of the by-law taken by counsel for the applicant, but it was intimated that, if necessary, the Court would hear argument thereon at some future time.]

October 24. BOYD, C.:—My brothers are agreed upon the correctness of the result arrived at in the Court below upon the main matter under consideration, *i.e.*, whether the proper voters' list was used upon the local option election. The list was one, no doubt, which in form complied with the statute: it was the last list of voters certified by the Judge and delivered or transmitted to the Clerk of the Peace.

The evidence shews that a complaint was made, and that the Judge proceeded to hold a Court of Revision thereupon, and made a slight change in the list submitted to him, adding two names, without such notice being given for the holding of the Court as is made a prerequisite by the Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 17. Had the Judge not held such a Court, he would have accepted the list submitted without the addition of the two names. These two names may be taken to have been wrongly added, but the certified list was in no other respect illegal. This did not *per se* vitiate the list, and the error would be so trifling as not to affect the result of the election—having regard to the votes cast.

Other slight irregularities appear, but not of such a character, singly or cumulatively regarded, as to withdraw the whole result from the curative clause of the Municipal Act (sec. 204). The general rule applicable to popular elections held not in strict conformity to law is that the onus is cast upon the complainant to shew affirmatively that the result would have been different if the illegality had not existed.

In this aspect of the appeal, I would affirm the judgment below, with costs.

RIDDELL, J.:—I agree in the result.

MIDDLETON, J.:—The clerk, exercising his ministerial or administrative functions in connection with the election, is bound by sec. 148 of the Municipal Act to use upon the voting the last list certified by the Judge, and transmitted as there required. The clerk is not to go behind the certificate of the Judge for the purpose of ascertaining whether he has duly discharged his functions. Unless and until the act of the Judge has been quashed or in some way annulled, it is conclusive upon all. *Re Schumacher and Town of Chesley* (unreported*) determined that a *certiorari* would not lie to bring up and quash a certificate of the Judge because of suggested error in determining matters over which he had jurisdiction. But where the Judge had no jurisdiction to enter upon the inquiry at all, by reason of the failure to observe the requirements of the statute, his certificate can be quashed. Until this is done the certificate exists, and must be acted upon—any attack upon it after the voting is too late.

I agree in the dismissal of the appeal.

*A decision of a Divisional Court (BRITTON, TEETZEL, and RIDDELL, JJ.), on the 4th April, 1910, dismissing an appeal from an order of MEREDITH, C.J.C.P., in Chambers, refusing a *certiorari*. A motion for prohibition had been theretofore made to MEREDITH, C.J.C.P., and dismissed. See *Re Schumacher and Chesley* (1910), 17 O.W.R. 174.

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Oct. 29

TOMS v. TORONTO R.W. Co.

*Damages—Street Railway—Collision of Street-car with Railway Engine—
Injury to Passenger—Physical Shock—Resulting Nervous Condition—
Jury—Direction to.*

The plaintiff, an elderly man, was a passenger in a street-car of the defendants, which was negligently allowed to come into collision with an engine at a railway crossing. By the force of the collision he was violently thrown from his seat over to the back of the next seat in front of him. No bones were broken, and there was no great bruising or other external injury. He got off the car without assistance and walked a short distance, and then, as he said, "collapsed," and for the time could go no further. Eventually he reached the place where he was employed, but was quite unable to work, and was obliged to go to his home and to bed, where he remained off and on for several weeks under a physician's care. Subsequently, the condition of traumatic neurasthenia developed, as the result, it was said, of the shock of the collision, and the plaintiff, it was asserted, was still suffering from that trouble at the time of the trial. A physician testified that the physical shock suffered excited the subsequent condition, and that that condition did not arise purely from an effect created on his mind:—
Held, that the case was different from those in which the mental shock, as from fright and the like, was the primary cause to which the resulting physical consequences had to be traced—the shock in this case was not primarily mental at all, but physical; the trial Judge properly refused to direct the jury to assess separately the damages resulting exclusively from mental shock and those resulting from physical injury; and a judgment for the plaintiff for \$1,500 damages assessed by the jury should not be disturbed.

Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, *Henderson v. Canada Atlantic R.W. Co.* (1898), 25 A.R. 437, and *Geiger v. Grand Trunk R.W. Co.* (1905), 10 O.L.R. 511, distinguished.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

AN appeal by the defendants the Toronto Railway Company from the judgment of FALCONBRIDGE, C.J.K.B., of the 16th March, 1910, in favour of the plaintiff for the recovery of \$1,500 damages from the defendants, in accordance with the finding of a jury.

The action was originally brought against the Toronto Railway Company and the Grand Trunk Railway Company, but was discontinued as against the latter company.

The plaintiff, by his statement of claim, alleged (1) that he was a commercial traveller; (2) that on the 7th October, 1908, he was travelling on a street car operated by the defendants the Toronto Railway Company and had paid his fare, and was a passenger for the purpose of being safely carried by the defendants the Toronto Railway Company on their railway in the city of Toronto; (3) that, whilst the plaintiff was such passenger, the car on which he was being carried, proceeding in an easterly direc-

tion on Front street, and approaching a point in the street where the street was intersected by a railway-crossing of the defendants the Grand Trunk Railway Company, came into violent collision with a freight train, at the point of intersection, by reason of the joint negligence of both defendants; (4) that the car in which the plaintiff was being carried was by such collision thrown from the rails, and, owing to the violence of the collision, and as a result of the joint negligence of the defendants, the plaintiff received serious injuries; (5) that by reason of his injuries the plaintiff was permanently crippled and disabled from pursuing his business, and had suffered great pain and great loss and damage; and he claimed \$10,000 damages.

By their amended statement of defence the defendants the Toronto Railway Company admitted the first two paragraphs of the statement of claim; in answer to the third paragraph, they said that the car on which the plaintiff was carried came into collision with a freight train belonging to the Grand Trunk Railway Company, by reason of the negligence of an employee of these defendants (*i.e.*, of the Toronto Railway Company); and, save as aforesaid, they denied all other allegations contained in the statement of claim.

At the trial the evidence shewed that the plaintiff had no bones broken and was not much bruised or outwardly injured, but his sufferings were due to the shock or concussion.

Counsel for the defendants asked the trial Judge to direct the jury to distinguish physical damage from nervous shock in their findings; but the trial Judge declined to do so; he put no questions to the jury; but simply asked them to assess the plaintiff's damages, which they did at \$1,500; and he directed judgment to be entered for the plaintiff for that sum, with costs.

The appeal was, by consent, taken directly to the Court of Appeal.

September 26. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

D. L. McCarthy, K.C., for the defendants, argued that, as the medical evidence given on behalf of the plaintiff was to the effect that he was suffering from "traumatic neurasthenia," and as it was almost impossible to distinguish neurasthenia of that type

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from that which results from merely mental shock, the trial Judge should have followed the course taken in *Henderson v. Canada Atlantic R.W. Co.* (1898), 25 A.R. 437, affirmed in *Canada Atlantic R.W.Co. v. Henderson* (1899), 29 S.C.R. 632, and submitted questions to the jury, asking them to assess separately the damages resulting exclusively from mental shock and those resulting from physical injury. The *Henderson* case was followed in *Geiger v. Grand Trunk R.W. Co.* (1905), 10 O.L.R. 511, and both these cases followed *Victorian Railways Commissioners v. Coultas* (1888), 13 App. Cas. 222, which is still followed in our Courts, although its authority has been questioned in England: see *Dulieu v. White & Sons*, [1901] 2 K.B. 669.

C. A. Masten, K.C., and *M. C. Cameron*, for the plaintiff. The case at bar, in which there was physical impact, is distinguishable from the *Coultas* case, in which no such impact occurred. There is no evidence of mental shock to the plaintiff at the time when the accident occurred, but there is evidence that he received a severe physical shock, the result of which was the neurasthenic condition from which he subsequently suffered. There was no evidence upon which the jury could have been asked to apportion the damages as suggested by the defendants' counsel, and the cases cited by him are, therefore, not in point. Reference was made to Beven on Negligence, 3rd (Canadian) ed., pp. 66-75, and to the dissenting judgment of Clute, J., in the *Geiger* case, *supra*, at p. 520 *et seq.*

McCarthy, in reply, argued that, if the *Henderson* and *Geiger* cases were rightly decided, the defendants should succeed in the case at bar, which was not distinguishable.

October 29. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Falconbridge, C.J., and a jury in favour of the plaintiff.

The action was brought to recover damages caused to the plaintiff by the negligent operation of a street car in which he was a passenger on the 7th October, 1908. The negligence was admitted. The jury assessed the damages at \$1,500.

The only question on this appeal is upon Mr. McCarthy's contention that there can be no recovery in respect of injuries of a

nervous origin, and that the question of damages should have been submitted to the jury, as in the case of *Henderson v. Canada Atlantic R.W. Co.*, 25 A.R. 437, affirmed 29 S.C.R. 632.

In his charge the learned Chief Justice said: "I was requested to put a question to you to separate the injuries as between the physical and the nervous injury. I declined to do that, for one reason, a very sufficient one, amongst others, that the question of physical injury is of very doubtful meaning. There was not any great physical injury in the sense that there were any bones broken or any great bruising or abrasion of the surface, but there may be a physical injury of a serious nature which is not indicated by any external mark. So, therefore, I leave the whole question to you to say what damages he ought to recover for the injury, if you think he has sustained any."

Mr. McCarthy's objection is not, I think, well founded. In the *Henderson* case this Court, if not with reluctance, at least without enthusiasm, followed without, in my opinion, any intention of extending, the principle of law declared in the case in the Privy Council of *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222. In that case the medical testimony was to the effect that the plaintiff had received a severe shock from the fright, for she was not touched, and that the illness from which she afterwards suffered was the consequence of the fright, and that the shock would be a natural consequence of the fright, but the question was not submitted to or passed upon by the jury, being reserved for the opinion of the full Court. And what was actually determined was that "damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot be considered a consequence which in the ordinary course of things would flow from the negligence of the gate keeper:" see p. 225.

In the *Henderson* case, as in the *Coultas* case, there was no actual impact, that is, no contact with the defendants' engine. What happened was that the plaintiff's horses were frightened by the engine and ran away, thus injuring themselves, the carriage, harness, and the plaintiff. The plaintiff recovered for the injury to the horses, carriage and harness, and also \$400 in respect of the shock to himself caused by "blow or blows," but failed to recover a further sum of \$600 assessed by the jury as due "in respect of

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personal injury resulting exclusively from mental shock." No objection was apparently taken at the trial by counsel for the plaintiff to the mode in which the questions were submitted to the jury. And it was with the question thus presented that this Court was called upon to deal, and in doing so felt constrained by the decision in the *Coultas* case to disallow the item of \$600 in respect of the personal injury "resulting exclusively from mental shock," all the other items of damages, including the \$400 caused by "blow or blows," having been allowed.

The *Coultas* case, as the decision of our ultimate court of appeal, is still, of course, a binding authority in this Province, although it is impossible not to feel that the situation is not satisfactory, and that the decision is to be applied with careful discrimination, when we find that the Courts both in England and Ireland refuse to follow it: see *Dulieu v. White & Sons*, [1901] 2 K.B. 669; *Bell v. Great Northern R.W. Co.* (1890), 26 L.R. Ir. 428; *Yates v. South Kirkby, etc., Collieries Limited*, [1910] 2 K.B. 538; *Eaves v. Blaenclwydach Colliery Co.*, [1909] 2 K.B. 73.

No one can object to the general principle enunciated at p. 225 that the "damages must be the natural and reasonable result of the defendants' act; such a consequence as in the ordinary course of things would flow from the act." But the stumbling block, or, if I may say so without disrespect, the vice of the decision, appears to be in treating as a question of law that which appears to be essentially one of fact, to be determined, like other questions of fact, upon competent evidence, namely, what are the natural and reasonable consequences, such as ordinarily flow from such acts as that of the defendants? This aspect of the question is very reasonably dealt with by Palles, C.B., in *Bell v. Great Northern R.W. Co.*, 26 L.R. Ir. 428, at p. 442, where he says: "I am of the opinion that, as the relation between fright and injury to the nerve and brain structure of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be 'a consequence which, in the ordinary course of things, would flow from the' negligence, unless such injury 'accompany such negligence in point of time.'" The two must, of course, be properly connected together by the evidence as cause

and effect, but the whole consequences need not have been at once apparent: see *Fitzpatrick v. Great Western R.W. Co.* (1855), 12 U.C.R. 645. And for what is purely mental, having no injurious physical consequences, there could be no recovery: see *Lynch v. Knight* (1861), 9 H.L.C. 577, at p. 598, *per* Lord Wensleydale.

The *Henderson* case was followed in *Geiger v. Grand Trunk R.W. Co.*, 10 O.L.R. 511, but it is worthy of note that the learned trial Judge, Teetzel, J., there was of the opinion that the cases might be distinguished, and that in the Divisional Court Clute, J., was also of that opinion. In that case there was actual impact of a kind, that is, the 'bus in which the plaintiffs were was struck by the defendants' car, and there were some slight physical injuries, but the only injuries actually found by the jury, in answer to questions divided as in the *Henderson* case, were those attributable exclusively to mental shock. The case was, therefore, made by this finding very similar to the *Henderson* case, and not easily to be satisfactorily distinguished.

This case, however, is essentially different in its facts from the *Coultas* case, the *Henderson* case, and the *Geiger* case. In all three the question arose with respect to the use by the plaintiffs of a highway. In this case the plaintiff, in addition to his other rights, was a passenger on the defendants' railway, and had, therefore, contractual rights. The defendants were bound by their contract safely to carry him, and they did not safely carry him, but, on the contrary, the car in which he was sitting was negligently allowed to come into collision with an engine on the railway crossing, whereby the plaintiff, an elderly man (aged 68), was violently thrown from his seat over to the back of the next seat in front of him. He managed to get off the car without assistance and walked away a short distance, and then, as he says, "collapsed," and for the time could go no further. Eventually he managed to get to the warehouse where he was employed as a bookkeeper, but was quite unable to work, and was obliged to go to his home and to bed, where he remained off and on for several weeks under a physician's care. Subsequently, the condition of traumatic neurasthenia developed, as the result, it is said, of the shock of the collision, from which it is claimed he was still suffering at the time of the trial.

The following questions and answers occurring in the examina-

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tion of Dr. MacPhedran, an experienced physician called by the plaintiff, seem to epitomise the situation from the plaintiff's point of view:—

“Q. And you think, taking the history of this case, and the account the man himself has given of the accident, that the injury was probably caused by the force applied to him externally by his being thrown over the seat, or a dumping of that sort? A. Take the history as he gave it to me, and I canvassed it carefully, that is, that he was well before, and that he was thrown so, and a short time afterwards he found himself so weak he could not walk, or at least walk with very great difficulty, and he had to leave his office and go home day by day—I took it, no doubt, that the physical shock that he suffered excited the condition that he was suffering from.

“Q. Yes. Do you take it from anything he said, or from considering him as a man himself in his condition, that he was injured purely from a mental effect created on his mind? A. No, I do not think so. I think the physical effect was the exciting cause.

“Q. You think the physical effect was the exciting cause? A. I do.

“Q. In other words, it is not a condition arising from sudden fear or something of that sort? A. I do not think so.

“Q. You think there is more in it than that?

“A. I think so.”

This seems to me clearly to distinguish this case from those in which the mental shock, as from fright and the like, was the primary cause to which the resulting physical consequences had to be traced. The shock in this case was not primarily mental at all, but physical—the ordinary “railway shock” with which the Courts have had to deal in many cases.

For these reasons, I think the appeal fails and should be dismissed with costs.

[IN THE COURT OF APPEAL.]

STRATI V. TORONTO CONSTRUCTION CO.

Dismissal of Action—Order Postponing Trial on Payment of Costs—Automatic Dismissal of Action on Default—Extension of Time for Payment after Default—Jurisdiction—Judge in Court—Divisional Court—Appeal—Con. Rule 353—Action, when “out of Court”—Discretion.

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After the trial of this action had been begun, the plaintiff applied for an adjournment, which was granted, upon terms of payment to the defendants of certain specified costs. The order was that the costs should be paid within ten days after taxation, and that, in default of payment within that time, “the action be and the same is hereby dismissed without costs.” The costs were not paid within ten days after taxation, and the trial Judge on the last day, extended the time until the second day thereafter at noon. About 12.40 on the last-named day the amount of the costs was offered to the defendants’ solicitors, and refused. The plaintiff then moved in the Weekly Court for an order further extending the time for complying with the original order:—

Held, by MIDDLETON, J., upon that application, that, as the original order was so framed that, upon the happening of the default, the action stood dismissed without further order, what was sought was not merely an extension of time, but that the action, which the trial Judge had dismissed, should be restored; and that could be done only by an appellate Court.

The application was refused; but MIDDLETON, J., gave leave to the plaintiff to appeal from the original order to a Divisional Court, and extended the time for so appealing, two months having elapsed since the original order was made.

The plaintiff appealed pursuant to such leave, and an order was made by a Divisional Court allowing the appeal and varying the original order by extending the time for payment of the costs for one week from the date of the order of the Divisional Court.

From that order the defendants appealed to the Court of Appeal:—

Held, by the Court of Appeal (MEREDITH, J.A., dissenting), that the action was not so entirely out of Court that it was not subject to the power of the Court or a Judge, under Con. Rule 353, to extend the time for appealing from the order, and to the power of the Court upon appeal to rescind or vary the order. The Divisional Court might have refused to entertain the appeal, either on the ground that the plaintiff, by acting under the order to the extent to which he had done so, had waived his right to appeal, or that by his delay the plaintiff had forfeited all right to an extension of time; but, notwithstanding these objections, the Court, in the exercise of its discretion, heard the appeal and made the order; and the discretion exercised should not be interfered with; the order was authorised by Con. Rule 353, and the defendants were not seriously prejudiced.

Held, also, that the action was not out of Court for all purposes; it was out of Court to the extent of disabling the plaintiff from taking any step other than towards procuring an extension of time for performance of the condition, or, failing that, for an extension of the time for appealing from the original order.

Per MEREDITH, J.A., that the order of the Divisional Court was wrongly made: first, because the plaintiff had no right of appeal against the original order; second, because the terms of the order were in the discretion of the trial Judge, and the discretion was not unwarrantably exercised; and, third, because there was really no appeal—it was merely a subterfuge to obtain an extension of the time; and the Divisional Court had no power to extend the time.

APPEAL by the defendants from the order of a Divisional Court of the 22nd June, 1910, allowing an appeal by the plaintiff from

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an order of LATCHFORD, J., pronounced on the 5th April, 1910, at the trial of the action, directing that, upon payment of certain costs within the time limited by the order, the trial of the action should be adjourned, and that, in default of such payment, the action should be dismissed without costs. The order of the Divisional Court extended the time for payment of the said costs, notwithstanding that such time had expired.

The action was brought by the administrator of the estate of Leone Lanata, deceased, who was killed while in the employment of the defendants, to recover damages for his death, on behalf of the widow and father and mother of the deceased.

The trial of the action was begun before LATCHFORD, J., without a jury, at Brockville, on the 4th April, 1910. After some evidence had been taken, the plaintiff applied for an adjournment to enable him to procure necessary evidence. The trial Judge granted the application upon terms, and the order made was, as drawn up and issued, as follows: "This Court doth order that the plaintiff do pay to the defendants all costs occasioned and lost by reason of the postponement of this trial, including a counsel fee of \$100, and all witness fees incurred by the defendants, within ten days after taxation thereof. And this Court doth further order that, upon payment of the said costs as taxed, within the time above limited, the trial of this action be and the same is hereby adjourned to the autumn sittings of this Court at the town of Brockville, to be then tried as now without a jury, unless the presiding Judge shall of his own motion otherwise order. And this Court doth further order that, in default of payment of the said costs within the time above limited, this action be and the same is hereby dismissed without costs."

The costs were taxed, and the taxing officer on the 5th May, 1910, certified that the amount at which they were taxed was \$301.66, including the counsel fee of \$100 fixed by the trial Judge.

The last day for payment of the costs was Monday the 16th May, 1910. Upon that day the plaintiff applied to LATCHFORD, J., for an extension of time for payment, and the learned Judge allowed an extension until Wednesday the 18th May at noon.

The costs not having been paid by the plaintiff within the time limited, he, on the 30th May, 1910, gave the defendants notice of a motion to the Court at Osgoode Hall for an order extending

the time for compliance by the plaintiff with the terms imposed by the order of LATCHFORD, J., or for an order directing that, upon the plaintiff paying to the defendants the amount of the costs taxed, the action should proceed to trial at the autumn sittings, or for such further or other order as might seem just.

Affidavits filed in support of this motion shewed that the amount of the taxed costs had been offered to the defendants' solicitors on the 18th May, 1910, but not till about forty minutes past noon, and had been refused.

June 2. The motion was heard by MIDDLETON, J., in the Weekly Court.

H. S. White, for the plaintiff.

Grayson Smith, for the defendants.

June 4. MIDDLETON, J.:—With much regret, I find myself unable to grant any relief on this motion. My brother Latchford, to whom I have spoken, agrees with me that, if possible, relief ought to be granted. Probably the only course open to the plaintiff is to appeal from the order of the trial Judge. If any leave is necessary, I grant that leave, so far as I have any power.

The series of cases of which *Crown Corundum and Mica Co. v. Logan* (1902), 3 O.L.R. 434, is the latest, do not really proceed upon the theory that the action is "dead." "In a case like this metaphor ought not to be used, and it is misleading to talk about an action 'dying:' such terms give rise to error when they are applied to the exposition of legal principles:" *per* Bowen, L.J., in *McGowan v. Middleton* (1883), 11 Q.B.D. 464, 473.

The real principle underlying all the cases, though sometimes lost sight of, is this. Upon the expiry of the time limited for doing the act in question, the Court has, under Con. Rule 353*, power to extend the time, but this power cannot be exercised if some action has been taken based upon the default, unless the Judge applied to has the power to undo that subsequent act. In cases in which a substantive motion is necessary to enforce the penalty attached to the default, until that motion has been dis-

*353. The Court or a Judge may enlarge or abridge the time appointed by these Rules, or any Rules relating to time, or fixed by any order for doing any act or taking any proceeding, upon such terms as may seem just; and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

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posed of the time may be extended. The difficulty arises only when the original order has been so framed that upon the happening of the default the action stands dismissed by virtue of its provisions. In this case what is sought is not merely an extension of time, but that I shall restore an action which the trial Judge has dismissed. That can only be done by an appellate Court.

There will be no costs of this motion, as, while the defendants may have the right to insist on the technical and perhaps temporary advantage they have obtained, greater liberality in practice would be commendable. See *per* Rose, J., in *Re Backhouse v. Bright* (1889), 13 P.R. 117, and *per* Robinson, C.J., in *Shaw v. Nickerson* (1850), 7 U.C.R. 541.

The order of MIDDLETON, J., as drawn up and issued, was as follows: "This Court doth order that the plaintiff, if he so desire, be at liberty to appeal from the order of the Honourable Mr. Justice Latchford to the Divisional Court, and that the time for appealing from the said order be and the same is hereby extended so far as may be necessary for the bringing of the said appeal. And this Court doth further order that save as aforesaid the said motion be and the same is hereby dismissed. And this Court doth not see fit to make any order touching the costs of the said motion."

Pursuant to the leave so granted, the plaintiff appealed from the order of LATCHFORD, J., to a Divisional Court.

June 22. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and MIDDLETON, JJ.

H. S. White, for the plaintiff.

Grayson Smith, for the defendants.

THE COURT, on the same day, made the following order:—

"This Court doth order that the said appeal be and the same is hereby allowed, and that the said order of the Honourable Mr. Justice Latchford be and the same is hereby varied by extending the time for payment of the said costs referred to in the said order for a period of one week from this date.

"And this Court doth further order that the costs of the said appeal be costs in the cause to the successful party."

The defendants appealed from this order to the Court of Appeal.

September 27. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

Grayson Smith, for the defendants. The plaintiff had no right of appeal from the judgment of the trial Judge; a final judgment had been pronounced in the action, which was conclusive between the parties, and which was pronounced upon the application of the plaintiff, and with his consent as to its terms: *Pierce v. Palmer* (1887), 12 P.R. 308; *Re Smart Infants* (1887), 12 P.R. 312; *Crown Corundum and Mica Co. v. Logan*, 3 O.L.R. 434; *International Wrecking Co. v. Lobb* (1887), 12 P.R. 207; *Duffy v. Donovan* (1891), 14 P.R. 159. This is not a case in which advantage is being taken of any slip in practice, and the solicitors for the defendants are simply acting under instructions from their clients, who claim their right to retain the final judgment which has been issued in their favour.

H. S. White, for the plaintiff, argued that the plaintiff had acted in good faith throughout, and it was only through the delay of the telegraph company that the money had not reached the defendants' solicitors in good time. In such a case relief should be granted: *Burke v. Rooney* (1879), 4 C.P.D. 226, *per* Lord Coleridge, C.J., at p. 230; *Carter v. Stubbs* (1880), 6 Q.B.D. 116.

Grayson Smith, in reply, argued that the cases cited by the plaintiff's counsel were not in point, as there the parties appealing from the judgment had not lost their right to do so by consenting to its terms. He referred to Con. Rule 787 and to *Imperial Loan Co. v. Baby* (1889), 13 P.R. 59.

October 29. Moss, C.J.O.:—The defendants were put to no serious prejudice by reason of the order of the Divisional Court from which this appeal has been taken. The plaintiff and his solicitor were struggling to comply with the terms of the order pronounced at the trial by Latchford, J., but, owing to an unfortunate omission on the part of the bank to which funds had been sent, the costs which were to be paid on or before noon on the 18th May, 1910, were not tendered to the defendants' solicitors until 12.40 in the afternoon of that day. The tender was not accepted, the defendants' solicitors contending that the time had

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elapsed and the action was out of Court. It was not so entirely out of Court that it was not subject to the power of the Court or a Judge, under Con. Rule 353, to extend the time for appealing from the order, and to the power of the Court upon appeal to rescind or vary the order. Upon application to Middleton, J., the time for appealing was extended. And the Divisional Court entertained the appeal and made the order now in appeal. That Court might have refused to entertain the appeal, either on the ground that the plaintiff, by acting under the order to the extent to which he had done, had waived his right to appeal, or that by his delay the plaintiff had forfeited all right to an extension of time. These objections were matters for the consideration of the Divisional Court, but, notwithstanding them, it decided, in the exercise of its discretion, that the appeal should be heard.

It is not correct to say that the action was out of Court. The result of the various decisions, some of which, however, do not seem to be quite in accord with the general trend, appears to be that in a case like the present the action is not, by reason of the lapse of time for performing the condition, out of Court for all purposes. It is out of Court to the extent of disabling the plaintiff from taking any step in the action other than towards procuring an extension of time for performance of the condition, or, failing that, for an extension of time for appealing from the order. The order made at the trial was not, in any sense, a dismissal of the action upon the merits, though the effect would be the same in case of non-compliance with the condition.

Then as to the order made by the Divisional Court. It was made in virtue of its discretionary power. It is no more than doing what is authorised by Rule 353, and the defendants do not suffer serious prejudice.

The slip which led to the money being tendered forty minutes after the time appointed by the order, as varied by the trial Judge's direction, seems not to have been due to intentional neglect.

The order appealed from should be allowed to stand, with such extension of time as may be necessary to enable the plaintiff now to pay the costs—say, within twenty-four hours from the issue of the certificate of this Court.

The costs of the appeal must be borne by the defendants.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—It is not, or rather it ought not to be, what one would like to do in such a case as this: if it were what one would like to do, no one would more readily than I support any order which would, on proper terms, enable the plaintiff yet to bring his action down to trial again. It is, or at all events it ought to be, what are the strict legal rights of the parties upon the questions raised in this appeal, unaffected by personal feeling; and thus I purpose dealing with the case.

The facts are not in dispute. The plaintiff brought his action on for trial, and, after the trial was begun, found that he could not succeed, because of carelessness in preparation for the trial, and consequent inability to prove his claim. He, therefore, sought and obtained the indulgence of a postponement of the trial, upon terms, one of which was the payment of certain costs within ten days after taxation. He was not bound to accept the order on the terms imposed; he might have declined it; but in that case his action would, no doubt, have been dismissed with costs; and he would then have had his appeal against that judgment, upon which appeal he could have urged that the terms proposed were too onerous, and have sought the indulgence on easier terms. But he was satisfied with, and accepted, the indulgence on the terms imposed; a thing which he might very well have done, seeing the great indulgence which was being extended to him, and the great inconvenience imposed upon the defendants in having the litigation dragging on over their heads, and of again making preparations for and coming to a trial of the action. The notes of the trial do not shew any sort of objection to the term respecting the payment of costs; every one seems to have been quite satisfied with that: indeed no fault has been at any time found with it; all that has been said is that, by reason of a circumstance unforeseen, the plaintiff was unable to comply with it. Finding such to be the case, he, some time after the trial, applied to the trial Judge to extend the time, and it was extended accordingly; but again, for the third time, he was unprepared, and obliged to seek a third indulgence, which, however, was refused, on the ground that the application came too late, that there was no power then to grant it. If that really were so, the plaintiff would have none but himself to blame after failure to be ready for trial when he had himself chosen the time for the trial, and after twice failing

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to make payment at times with which he was satisfied when they were fixed, and which he is not able now to say were insufficient if it had not been for accidents—which nearly always mean ill-management.

So that we have the case of a party seeking an indulgence and getting it, and thus saving himself from having his action dismissed, acting upon the order granting the indulgence without any sort of objection to it, but intending throughout to comply with its terms; and not only that, but taking advantage of it to seek, and obtaining, a further indulgence based upon it, in an extension of the time limited by it for the payment of the costs.

To say that an appeal would lie at the instance of the plaintiff against his own order, thus sought, obtained, and acted upon by him, as well as by the defendants, and never in any manner objected to by either of them, seems to me to be manifestly absurd. If any should deem the last two words too expressive, let me quote for their benefit the words of the appellate Court of the State of Missouri expressed in the case of *Waddingham v. Waddingham* (1887), 27 Mo. App. 596, 606: "That a party should be heard in this Court to complain of the imputed errors committed and wrongs done him by the trial Court, which led to the judgment appealed from, when he has reaped and enjoyed the fruits of that judgment, strikes the plainest dictates of common sense and common right as intolerable."

In the plaintiff's favour it may be said that it does not ever seem to have occurred to him that he had any right of appeal against his own order, until he failed in his last attempt to have the time for payment of the costs extended, and after it had been suggested, probably as the forlorn hope, upon that application.

However, the application was made to a Divisional Court, ostensibly as an appeal against the order made at the trial, but really for the sole purpose of obtaining an extension of the time limited by the second order of the trial Judge, for payment of the costs; and that Court made the order really sought—a mere extension of the time. That order was, in my opinion, wrongly made: first, because the plaintiff had no right of appeal against the order made at the trial; second, because the terms of the order were in the discretion of the trial Judge, a discretion which no one can say was unwarrantably exercised: all parties were satisfied with it; no one even

now suggests that it was wrong at the time; all that can be said is that the plaintiff's subsequent unforeseen "accidents" entitle him to an extension of time; and, third, there was really no appeal—it was a mere subterfuge to obtain an extension of the time.

It is very plain that the Divisional Court had no power to extend the time. The order dismissing the last application for an extension is binding upon the parties. A Divisional Court could acquire power in that respect through an appeal against that order only; a thing which perhaps might yet be done; but until regularly done must remain in all things as undone. Middleton, J., gave leave to appeal from the order made at the trial only; there was no appeal from his order; if there had been, the case would be a very different one. I know of no power in the learned Judge to give the leave to appeal which he did; but nothing turns upon that in the view I have taken of this case.

For these reasons, I can come to no other conclusion than that the order of the Divisional Court was wrong; that this appeal should be allowed; and the application to the Divisional Court dismissed.

Appeal dismissed, MEREDITH, J.A., dissenting.

[IN THE COURT OF APPEAL.]

REX V. TRAPNELL.

Criminal Law—Assisting in Escape of Prisoners—Lunatics Acquitted on Trial for Crimes—Special Verdicts—Detention in Provincial Asylum—Order of Lieutenant-Governor—Sentence of Imprisonment—Lawful Custody—Criminal Code, secs. 192, 966, 969—Conviction—Evidence—Accomplice—Corroboration.

The defendant, an attendant in a provincial asylum for the insane, was convicted of assisting two persons to escape therefrom. These persons were confined in the "criminal house" of the asylum, upon an order of the Lieutenant-Governor of the Province, made under sec. 969 of the Criminal Code. They had been charged with the commission of crimes, and, upon trial, had been, in a sense, acquitted; but the acquittal was a part only of the verdicts; they were special verdicts under sec. 966 of the Criminal Code, the full import of which was that each had committed the crime with which he was charged, but was insane at the time, and on that ground only was acquitted. The order at the trial of each was that he be kept in strict custody until the pleasure of the Lieutenant-Governor be known; and the order of the Lieutenant-Governor was that he be conveyed to and detained in the provincial asylum:—

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Held, that Parliament had power to impose the penalty of imprisonment upon one who had the excuse of insanity for his misdeed; that the men were in lawful custody under a sentence of imprisonment for less than life; their escape was one coming within the provisions of the Criminal Code respecting escapes and rescues; and the defendant, in assisting their escape, was guilty of an indictable offence under sec. 192.

Held, also, that there was evidence to support the conviction—the testimony of a witness who was said to have been an accomplice being corroborated.

CASE reserved and stated, under sec. 1014 of the Criminal Code, by JOHN FRANKLIN MONCK, Junior Judge of the County Court of Wentworth, sitting as Judge of the County Court Judge's Criminal Court, as follows:—

“On the 6th September, 1910, Monteith Trapnell was tried before me on the following charge: ‘That the said Monteith Trapnell, on the 15th day of August, 1910, at the township of Barton, in the said county, did unlawfully aid and assist William Alexander Moir and Robert Frederick Taggart, they then being prisoners in the lawful custody of Walter Murray English, Medical Superintendent of the Asylum for the Insane at Hamilton, lawfully confined in the said asylum, to escape from such lawful custody and from said asylum, the said asylum being a prison within the meaning of the law in such cases made and provided.’

“At the conclusion of the said trial as aforesaid, I found the prisoner guilty, but reserved sentence pending the judgment or finding of the Court of Appeal for Ontario on the following facts.

“The evidence supporting my finding shewed that the defendant was an attendant at the Hamilton Hospital for the Insane, situate in Barton township; that the said prisoner Monteith Trapnell aided and assisted in the escape of William Alexander Moir and Robert Frederick Taggart from the said Hamilton Hospital for the Insane, the said William Alexander Moir and Robert Frederick Taggart being detained therein as insane patients under the warrants of the Lieutenant-Governor of the Province of Ontario, put in as exhibits at the trial.

“The evidence taken at the trial is made part of this case.

“It was admitted at the trial that the Criminal Code of Canada does not cover the offence, if any, committed, but that, if an offence was committed, it must be covered by the common law of England applicable to Canada.

“The questions stated for the consideration of the Court are as follows:—

"1. Was any offence committed by the prisoner Monteith Trapnell under the common law of England applicable to Canada?

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"2. Does the common law go so far as to make it an offence to rescue or aid and assist in the escape of these patients from said insane asylum by an attendant such as the prisoner Trapnell was?

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"3. If any offence was committed, what provision has been made, by common law or otherwise, for the punishment thereof?

"4. Is an insane asylum a prison?

"5. Are insane patients prisoners?

"6. Was there sufficient evidence to convict?"

September 27. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

M. J. O'Reilly, K.C., for the prisoner. It is admitted by the Crown that the defendant has not committed any offence for which he can be indicted under the Code, and it is submitted that he is not guilty of any offence under the common law of England which is applicable to this country, *i.e.*, the criminal law of England as it stood on the 17th September, 1792. Moir and Taggart were not criminals, but insane patients confined in an asylum, who had been tried for murder and acquitted by the jury on the ground of insanity. There is no provision in our law under which the defendant can be convicted of any offence, nor was there any in England until the passing of the Criminal Lunacy Act of 1860, which is not in force here. No oath was taken by the defendant, and all he can be charged with is a breach of duty or trust. As to the punishment for aiding in a rescue, the only provision of the common law is that a person aiding in a rescue shall be liable to the same penalty as the escaped person. The indictment does not shew the offence of which the escaped persons were convicted, nor what sentence was imposed upon them, both of which should be shewn in order to impose liability to punishment on the person aiding in the escape. Reference was made to the following authorities: Hawkins's Pleas of the Crown, ed. of 1824, vol. 2, ch. 21, secs. 1, 5, 8; ch. 19, secs. 14, 22, 26; Bowen-Rowlands on Criminal Proceedings, 2nd ed., p. 149; Roscoe's Criminal Pl. & Ev., 13th ed., pp. 301, 745; Russell on Crimes, 7th ed., p. 567. [MEREDITH, J.A., referred to *Regina v. Allan* (1841), 1 Car. & M. 295.] That is the only case that in any way helps the Crown, and it is only

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the decision of a Commissioner. The only evidence against the defendant is that of an accomplice, who was told that it would not go so hard with him if he made a confession. An asylum is not a prison, and was not so even in England until a recent date: *Rex v. Freeman* (1745), 2 Stra. 1226.

J. R. Cartwright, K.C., for the Crown. The offence with which the defendant was charged was one at common law: *Regina v. Allan, supra*. The persons in whose escape he aided were in lawful custody, and confined in prison, under the authorities: *Hobert v. Stroud* (1631), 79 Eng. Rep. 784, where it is stated that "every place where a person is restrained of his liberty is a prison." A similar definition is given in Murray's Dictionary. He also referred to Archbold's Crim. Pl. & Ev., 23rd ed., p. 1028, and to Hawkins, vol. 2, ch. 18, sec. 4. As to the punishment provided in such cases, reference was made to sec. 1052 of the Code. The evidence upon which the conviction was made was sufficient.

O'Reilly, in reply.

October 29. The judgment of the Court was delivered by MEREDITH, J.A.:—It is essential to ascertain, in the first place, the character of the custody in which the men who escaped were held. They were confined in that which is called the criminal house of the Provincial Asylum at Hamilton, upon an order of the Lieutenant-Governor of the Province, made under sec. 969 of the Criminal Code; so that their custody must have been as criminals; otherwise the enactment would be *ultra vires*; civil rights, and the establishment, maintenance, and management of asylums, are exclusively provincial matters.

But it is said that these men had been acquitted, and how, then, could they be detained except as lunatics simply? It is true that they were, in a sense, acquitted by the juries by which they were tried; but the acquittal was a part only of the verdicts; they were special verdicts under sec. 966* of the Criminal Code,

*966.. Whenever evidence is given upon the trial of any person charged with an indictable offence, that such person was insane at the time of the commission of such offence, the jury, if they acquit such person, shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity.

2. If the jury finds that such person was insane at the time of committing such offence, the court before which such trial is had shall order such person to be kept in strict custody in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant-Governor is known.

the full import of which was that each had committed the crime with which he was charged, but was insane at the time, and on that ground only was acquitted. If they had been found not guilty of the commission of the crime, they would have been entitled to their discharge out of custody; the Criminal Code makes no provision for detention in such a case. It is to be observed, too, that the provisions of the Criminal Code under which these men were tried and are imprisoned do not apply to those who are insane at the time of trial, but only to those who are then so sane as to be capable of defending themselves; other like provisions are contained in the Criminal Code respecting those who are so insane as to be incapable of conducting their defences, and also as to those who have become insane after sentence—all are, generally speaking, made subject to the order of the Lieutenant-Governor of the Province.

It, therefore, seems to me that these men were in custody under the criminal law of the Dominion by reason of the crimes which they had committed; and no one can doubt the power of Parliament to impose such a penalty even upon one who has the excuse of insanity for his misdeed; though it has been held that such legislation would be *ultra vires* in some of the United States of America.

A great deal of light is thrown upon the subject by Darling, J., in delivering the judgment of a Court of Criminal Appeal in England, very recently, in the case of *The King v. Ireland*, [1910] 1 K.B. 654, in which it was held that a person in substantially the same position as these men had been "convicted on indictment" within the meaning of the Criminal Appeal Act, 1907. It is true that in England, under the Trial of Lunatics Act, 1883, the form of special verdict has been very much changed, that the jury, under it, instead of acquitting on the ground of insanity, find that the accused was guilty of the act or omission charged against him, but was insane when it was done or omitted. That, no doubt, is the more accurate way of putting it, but in substance it seems to me to be the same as the finding under the Criminal Code; and the consequences are the same—detention pending the pleasure of His Majesty, in England, of the Lieutenant-Governor of the Province, in Canada.

These men were, therefore, in my opinion, in lawful custody,

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under a sentence of imprisonment for crime; and so their escape was one coming within the provisions of the Criminal Code respecting escapes and rescues. That, at the trial, it was agreed, on all hands, otherwise, cannot alter the fact, if such it be; nor warrant this Court in treating the case as if it really were such an one as counsel were agreed that it was.

The case seems to me to come under sec. 192* of the Criminal Code; the men were in lawful custody under a sentence of imprisonment for less than life. The order at the trial of each was that he be kept in strict custody until the pleasure of the Lieutenant-Governor should be known; the order of the Lieutenant-Governor was that he be conveyed to and detained in the Provincial Asylum at Hamilton. These things surely amount to a sentence of imprisonment, and none the less so because "indeterminate." It is less than imprisonment for life, because, although it may last for life, yet it may be shorter—a day, a month, a year or years.

Upon the other point in the case, whether there was any evidence to support the conviction, little need be said, there being so little to support Mr. O'Reilly's contention in this respect. There was the positive testimony of the witness who is said to have been an accomplice, corroborated, very much, by the testimony of the police constable, and to some extent by circumstances surrounding the escape. The learned Judge who tried the case was very well aware of the reasons for, as a matter of fact, requiring corroboration of the story of an accomplice; so that, if there had been less evidence than there is, this point would fail: see *Rex v. Frank* (1910), 21 O.L.R. 196.

I would answer such questions as are material and proper in accordance with the views I have expressed.

*192. Every one is guilty of an indictable offence and liable to five years' imprisonment who,—

(a) rescues any person, or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under a sentence of imprisonment for any term less than life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with imprisonment for a term less than life; or,

(b) being a peace officer having any such person in his lawful custody, or being an officer of any prison in which such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

[IN THE COURT OF APPEAL.]

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Oct. 29.

Criminal Law—Indictment for Rape—Verdict of “Common Assault”—Competency—Evidence of Previous Unchastity of Complainant—Inadmissibility—New Trial—Stated Case.

Upon a case stated for the opinion of the Court by the Judge presiding at the trial of the prisoner upon an indictment for rape:—

Held, in answer to the first question, that upon an indictment for rape a verdict of “common assault” may properly be found: Criminal Code, secs. 14, 298, 951.

2. At the trial the complainant was a witness, and was asked, on cross-examination, whether, before the alleged rape, she had not been living as his wife with the man who afterwards became her husband, which she denied:—*Held*, that evidence of witnesses to contradict the complainant as to this was improperly admitted.

3. *Held*, MEREDITH, J.A., dissenting, that it was unnecessary to answer the third question, *viz.*, whether, in the event of the first question being answered in the negative, there should be a new trial, the first question having been answered in the affirmative.

Per MEREDITH, J.A., that, there having been a mistrial through the improper admission of evidence which might have affected the verdict, the Crown was entitled to a new trial.

THE following case was stated by RIDDELL, J., for the opinion of the Court of Appeal:—

1. The prisoner was charged with committing rape upon the person of one Alice McCarger, the prosecutrix, on the 31st January, 1910.

2. At the time of the alleged rape the said prosecutrix was unmarried, but was married to one Van Nest on the 8th February, 1910.

3. The prosecutrix on cross-examination was asked whether she had not, for some time before the 31st January, been living with her future husband Van Nest as his wife, and so reputed, at 81 Shuter street, Toronto. She answered in the negative.

4. Against the objection of the Crown, I allowed the defence to give evidence, by the proprietors of the house and a roomer thereat, that Van Nest and the prosecutrix had been so living at the said place openly as man and wife.

5. The evidence of the prosecutrix was that the prisoner had assaulted her and thrown her down and had connection with her, all against her will. The prisoner swore that he had connection with her, but that she was a consenting party throughout.

6. I told the jury that it was for them to consider whether her

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living with Van Nest as his wife (if they should think such was the fact) would be more likely to cause her to consent to the designs of the prisoner.

7. I also told the jury that they must determine what evidence they would believe, and that they were not bound to believe any witness, or, if they should accept part of the evidence of any witness, they were not bound to believe the remainder; that they might accept part of the evidence of the prosecutrix and part of the evidence of the prisoner. I told the jury that, if they believed the whole of the account given by the prosecutrix of the occurrence, they should find a verdict of "guilty;" if the whole of that given by the prisoner, their verdict should be "not guilty;" but that, if they believed that part of the evidence of the prosecutrix which shewed that the prisoner had, without her consent and against her will, laid violent hands upon her, and if they should also believe that part of the evidence of the prisoner which shewed that she did consent to the carnal connection, they were at liberty (if they thought the fact was so) to find that, while the prosecutrix did not consent to the criminal attack upon her, and that this was wholly against her will and without her consent, still she did, before the carnal intercourse, consent to such carnal intercourse being had, and that, if they did so find the fact, they might find a verdict of "common assault;" I also told them specifically that such a verdict could not be found if the prosecutrix consented from the beginning; and that consent was as good a defence to a charge of assault as it was to a charge of rape.

8. The jury found a verdict of "common assault."

9. The prisoner's counsel objected to my allowing the jury to find a verdict of "common assault;" and at his request I reserve a case for the Court of Appeal upon this point.

10. The Crown objects that I should not have allowed the evidence referred to in paragraph 4 hereof; and at the request of the Crown I reserve a case for the Court of Appeal upon this point.

11. The prisoner is remanded for sentence, upon bail, till the 29th October, 1910.

12. The Crown does not ask for a new trial in case I wrongly admitted the said evidence, unless the Court should think the verdict of "common assault" should not stand.

The questions of law reserved for the Court of Appeal are as follows:—

1. Had the jury power to find a verdict of "common assault" upon this indictment for rape?

2. Was I right in admitting the evidence referred to in paragraph 4 of the case?

3. If the answer to question 1 is in the negative, should there be a new trial?

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September 27. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. R. Cartwright, K.C., for the Crown, argued that the jury had power to find a verdict of "common assault," under sec. 951 of the Criminal Code, citing *Regina v. Edwards* (1898), 29 O.R. 451, and *Regina v. Guthrie* (1870), L.R. 1 C.C.R. 241. The evidence referred to in the second question was not properly admissible: Archbold's *Crim. Pl. and Evid.*, 23rd ed., pp. 312, 910; *Rex v. Finnessey* (1906), 11 O.L.R. 338.

T. C. Robinette, K.C., who was counsel for the defendant at the trial, was unable to be present at the argument, but subsequently, by leave of the Court, submitted a written statement, in which he reviewed the evidence, and argued that the jury, in giving their verdict of "not guilty" of rape, must have concluded that the female, Alice Van Nest, gave her consent to the defendant's act, and, if she gave her consent, there could be no rape or common assault: *Regina v. Meredith* (1838), 8 C. & P. 589; Russell on Crimes, 6th ed., vol. 3, pp. 236, 237. He also referred to the fact that since the trial Alice Van Nest, who was the complainant and chief witness in the case, had been convicted of perjury in her evidence at the trial as to a collateral matter.

October 29. MOSS, C.J.O.—The accused was not represented by counsel upon the argument of this case, but subsequently a written argument was submitted on his behalf.

The answer to much that is said there is that the questions for the opinion of the Court are not whether, in view of what, according to the evidence, undoubtedly occurred on the occasion of the alleged rape, the learned trial Judge did right in leaving it to the jury to pass upon the question of common assault, or whether, upon the evidence, the verdict of common assault, which the jury found, was a verdict which they should have found. So far as the verdict is

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concerned, the sole question submitted is: Had the jury power to find a verdict of "common assault" upon this indictment for rape?

As pointed out by my brother Meredith, the abolition of the distinction between felony and misdemeanour by sec. 14 of the Criminal Code, and the provisions of other sections of the Code to which he refers, remove the objections which formerly appeared to exist. And I agree with the conclusion which he has reached upon this branch of the case. It may be also pointed out that the form of the indictment in this case goes far towards enabling the jury to find a verdict of common assault, for it contains a charge of assault as well as one of rape.

I also agree that the evidence referred to in paragraph 4 of the case was inadmissible, under the circumstances, and should have been rejected.

The effect of the answers to questions 1 and 2 being that the conviction for common assault stands against the prisoner, the necessity for answering the third question does not arise. The Court is only asked to answer it in the event of the answer to the first question being in the negative, and it has been answered in the affirmative.

MACLAREN, J.A.:—On an indictment for rape tried at the Toronto Assizes before Riddell, J., the jury found a verdict of "common assault."

At the request of the defence the trial Judge reserved for the consideration of this Court the following question: "Had the jury power to find a verdict of 'common assault' upon this indictment for rape?"

Section 951 of the Criminal Code provides that "every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved."

Rape is defined in sec. 298 as follows: "Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act."

An assault is included in every case of rape as a necessary ingredient. The usual form of an indictment for rape is that "A. did assault B., a woman who was not his wife, and did then and there have carnal knowledge of her without her consent." See *Regina v. Edwards*, 29 O.R. 451, and *Regina v. Guthrie*, L.R. 1 C.C.R. 241. This question should be answered in the affirmative.

The complainant, on cross-examination, was asked whether, before the date of the alleged crime, she had not been living with her future husband as his wife, which she denied. The Judge allowed the defence to bring witnesses to prove that she had done so. At the request of the Crown he has asked of this Court the further question: "Was I right in admitting this evidence?"

The question put to the complainant was one that was not relevant to the issue of rape that was being tried. Whether or not the complainant had been doing what was suggested by the question did not relate to the question of rape. The crime might be committed against her in either event. It has long been settled that when an irrelevant question of this nature is put to a witness of the opposite party, and is answered, the party putting the question is bound by the answer and cannot be allowed to produce witnesses to prove that the answer is false. Taylor on Evidence, sec. 1439, says: "The rule is founded on two reasons: first, that a witness cannot be expected to come prepared to defend . . . all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues."

I am of opinion that this question should be answered in the negative.

In the event of the first question being answered in the negative, a third question was asked, *viz.*, whether there should be a new trial; but this has become unnecessary in view of the affirmative answer suggested above to that question.

GARROW and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—There cannot, I think, be any doubt or difficulty involved in any of the questions asked.

Under the Criminal Code, "The distinction between felony and misdemeanour is abolished, and proceedings in respect of all of-

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fences," except so far as they are therein varied, "shall be conducted in the same manner:" sec. 14; and, "Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included;" but, "on a count charging murder, if the evidence proves manslaughter but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence:" sec. 951.

In view of the changes thus wrought in procedure in criminal cases, and of the very plain words of the enactment, which I have quoted, there can be no other answer than "yes" to the abstract question: Is there power to find a verdict of "common assault" upon an indictment for rape? Rape necessarily "includes" an assault. The cases to which I referred during the argument, but was unable to name, are *Wilkinson v. Dutton* (1863), 32 L.J.M.C. 152, and *Re Thompson* (1860), 6 H. & N. 193.

The question as to the admissibility of evidence seems to me to be equally free from doubt. The question which was asked the prosecutrix was not material to the issue, and her answer was conclusive. Upon principle and upon the authorities, this is plainly so: it may be that some cases have encroached upon the principle involved to some extent, but there is nothing that warrants, in these days, the admission of such evidence. If it were open to the defence to prove every separate improper act in the life of a witness for the prosecution, or of a prosecutrix, why not also every such act of the accused? Doubtless juries might think such evidence helpful to them, and in some cases it might be very much so, but there are other things to be considered; fair play would require that notice should be given of the intention to prove such things, and that the witness should have opportunity to meet the charge; and so one case might include the trial of many, which would be practically impossible, as well as perhaps more often distracting than helpful to the minds of the jury. The evidence admitted was adduced for the one purpose of proving a single immorality on the part of the witness, and was, in my opinion, plainly inadmissible.

The third question should, in my opinion, be answered in the affirmative; that is, that the Crown is entitled to a new trial. There having been a mistrial through the improper admission of evidence which may have affected and probably did affect the verdict, the Court should allow a new trial. I do not think that we are very much concerned with what the Crown intends to do; my concern is to deal with the case reserved. The trial Court cannot restrict the power of this Court under sec. 1018 of the Criminal Code.

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[DIVISIONAL COURT.]

STERLING BANK OF CANADA V. ROSS.

Buildings—Encroachment on Highway—Legislative Sanction—47 Vict. ch. 50 (O.)—Condition—Rebuilding—Party Wall—Removal—Injunction.

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In 1872 C. was the lessee of a parcel of land in a town, at the corner of P. and S. streets, for the unexpired portion of a term of 50 years from the 20th July, 1843. By a sublease, C., through whom the plaintiffs claimed, leased the southerly 32 feet of this lot to M., through whom the defendant claimed—M., by the instrument, agreeing to construct, upon the land leased to him, a wall extending from P. street easterly upon the north limit of the demised land, which C. was to be at liberty to use as a partition wall for any building he might erect upon the land retained by him, and, for that purpose, to insert beams, joists, etc., in the wall, spoken of as "the northern wall of M.'s building." Both buildings were erected as contemplated, the whole of the wall referred to standing on M.'s land. After the erection of the buildings, a survey was made of the town, and it was found that the buildings on P. street, including the two mentioned, encroached 20 inches upon the highway. By 47 Vict. ch. 50 (O.), the survey was confirmed, subject to the provision that, where any building had been erected encroaching upon the highway as shewn upon the plan, it should not be incumbent upon the owner or occupant to remove it off the street until the rebuilding of such building or the repair to the extent of fifty per cent. of the then cash value thereof; and the future occupation of the street was not to be deemed to create or confer any estate therein. In April, 1910, the defendant's building was destroyed by fire, but the partition wall remained intact:—

Held, that the effect of the provisions of the sublease was to confer on C. the same right to use the wall as if it were a party wall, and, when it was so used by building into it the beams and joists of C.'s building, it became an integral and necessary part of that building; the right to use the wall as a partition wall, and to fit beams, etc., into it, was more than an easement—it was an interest in the land itself; the plaintiffs were not rebuilding, nor was their building being repaired, and the license conferred by the statute was, therefore, still subsisting, and it was not open to the defendant to pull down the part of the wall encroaching upon the street; CLUTE, J., dissenting.

Judgment of MIDDLETON, J., affirmed.

MOTION by the plaintiffs for an *interim* injunction restraining the defendant from pulling down or injuring a certain wall.

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September 16. The motion was, by consent, turned into a motion for judgment, and was heard by MIDDLETON, J., in the Weekly Court of Toronto.

Irving S. Fairty, for the plaintiffs.

J. A. Macintosh, for the defendant.

September 19. MIDDLETON, J.:—Both parties ask me to assume that their rights are to be determined upon the agreement as to the wall in question contained in the sublease of the 1st April, 1872, although both the lease and the sublease have long since expired, and there is no evidence before me as to renewal.

At the date of the sublease, one Samuel Cline was the lessee of the parcel of land 80 ft. square at the south-east corner of Pitt and Second streets, Cornwall, for the unexpired portion of a term of 50 years from the 20th July, 1843. By a sublease, Cline, through whom the plaintiffs claim, leased the southerly 32 feet of this lot to Macdonell, through whom the defendant claims. Macdonell, in this lease, agreed to construct upon the land leased to him a wall extending from Pitt street easterly upon the north limit of the demised land, which Cline was to be at liberty to use as a partition wall for any building he might erect upon the lands retained by him, and, for that purpose, to insert beams, joists, etc.; therein.

Both buildings were erected as contemplated, and no difficulty seems to have arisen till the present time.

In April, 1910, the defendant's building was destroyed by fire; the wall in question, however, remained intact.

Some time after the making of the sublease and the erection of the buildings, a survey was made of the town, and it was found that the buildings upon Pitt street, including those upon the lands in question, encroached 20 inches upon the highway. Some question being raised as to the accuracy of this survey, application was made to the Legislature for an Act validating it, and, by 47 Vict. ch. 50, the survey was confirmed, subject to the provision that, where any building had been erected encroaching upon the highway as shewn upon the plan, "it shall not be incumbent upon the owner or occupant of such . . . building to remove the same off such street until the rebuilding of such . . . building, or the repair to the extent of fifty per cent. of the then cash value thereof." The future occupation of the portion of the street was not to be deemed to create or confer any estate therein.

The occupation of a portion of the municipal highway by an encroaching building does not confer any title to the land so encroached upon: *City of Toronto v. Lorsch* (1893), 24 O.R. 227 (on demurrer); and the possession sanctioned by this Act has been defined in *Williams v. Town of Cornwall* (1900), 32 O.R. 255, as a legislative legalising of that which would otherwise be an indictable nuisance.

Although Cline and Macdonell were then acting in good faith, and, for all I know, in accordance with their real rights, the statute confirming the survey compels me to find that, so far as regards the 20 inches between what they assumed to be the east boundary of Pitt street and the boundary conventionally established by the statute of 1884, both parties were trespassers upon municipal property.

The defendant's building, having been destroyed, is now being rebuilt, and the town council requires, as is admittedly its right and duty, that the new building shall conform to the statutory street line.

The defendant desires to remove the 20 inches of wall standing upon the highway in front of her premises, so as to enable the front of her new building to extend across the full width of the lot. She offers, as a matter of grace, to contribute towards the cost of constructing a new wall upon the portion of the street yet in the plaintiff's possession under the statutory license, but denies the plaintiff's right to maintain this 20 inches of existing wall.

There is no dispute between the parties as to the wall east of the street line. It is admitted that this is still a party wall, subject to the agreement in the sublease.

The plaintiffs' motion for an interim injunction has been, by consent, turned into a motion for judgment.

The defendant contends:—

(1) That, her building having been destroyed, she is now bound to remove this wall—the statutory license of occupation being at an end.

(2) That the agreement between the parties relating to the wall—being an agreement with respect to a trespass—is illegal and void.

(3) That the plaintiffs cannot complain, because their own building has been repaired to such an extent as to terminate the statutory license to occupy the highway.

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In my view, the effect of the statute was to operate as a legislative sanction to the buildings erected at the date of the Act in question remaining upon the street, and that the wall in question was a party wall, and constituted an integral part of each building, and may be maintained so long as either building is entitled to remain upon the strip of land in question.

The plaintiffs and defendant, as successors of Cline and Macdonell, respectively, are bound by the terms of the agreement, and neither is at liberty to set up as against the other that the wall in fact trespasses upon the highway.

If such facts exist as to have brought the plaintiffs' license to occupy to an end, the building has become a nuisance, and may be abated as a nuisance, or the municipality may maintain ejectment (*City of Toronto v. Lorsch, supra*), but the defendant has no right herself to destroy the wall.

The plaintiffs are entitled to the injunction and to costs, which I fix at \$80.

The defendant appealed from the judgment of MIDDLETON, J.

September 27. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

J. A. Macintosh, for the defendant. The building having been destroyed by fire, the defendant is now bound to remove the wall in question—the statutory license of occupation being at an end: 47 Vict. ch. 50 (O.) The property in the wall has always been in the defendant, and all the plaintiffs ever had was an easement; and therefore the wall is not a part of the plaintiffs' building within the meaning of the statute. In *Watson v. Gray* (1880), 14 Ch. D. 192, at p. 194, are mentioned the various meanings assigned to the term "party wall." The third class there enumerated fits the present case. The wall here belongs entirely to the defendant; the plaintiffs had only an easement, which, as to the 20 inches encroaching on the street, the statute destroyed. The agreement made between the parties relating to the wall, being an agreement with respect to a trespass, is illegal and void. As to when an easement ceases, see *Jones on Easements*, ed. of 1898, sec. 707.

G. Wilkie, for the plaintiffs. By the agreement between the

parties, the wall is made a partition wall, and the plaintiffs' right therein is more than an easement; it is an interest in land: *Lewis v. Allison* (1899), 30 S.C.R. 173. The wall is made a part of the plaintiffs' building, as well as of the defendant's building. Once the plaintiffs exercised the right which they had to fit the beams into the wall, and so use it as a partition wall, the wall became an integral part of their building, without which it would not stand, and, under the statute 47 Vict. ch. 50, the plaintiffs have a right to maintain it: *Williams v. Town of Cornwall*, 32 O.R. 255.

Macintosh, in reply.

November 1. MEREDITH, C.J.:—This is an appeal by the defendant from the judgment of Middleton, J., dated the 19th September, 1910, by which the defendant is enjoined and restrained "from pulling down, injuring, destroying, or interfering with that portion of the wall between the building of the plaintiffs, in the town of Cornwall, and that of the defendant adjoining thereto, lying west of the easterly boundary of Pitt street, as established by statute, 47 Vict. ch. 50 (O.), and from in any way interfering with the right of the plaintiffs to support of the said wall for their said building."

The material facts are set out in the reasons for judgment of my learned brother, and it is not necessary to repeat them.

The sole question necessary to be determined in order that the rights of the parties as to the matter in controversy may be ascertained, is, whether or not, in the events that have happened, the right to maintain the wall in question, so far as it encroaches on Pitt street, conferred by the Act mentioned in the judgment, has come to an end, and the determination of that question depends upon whether the wall, as my learned brother has decided, formed an integral part of the respondents' building as well as of the appellant's, or, as is contended by the appellant, it formed part of her building only.

Except the part of it which encroaches on Pitt street, the whole of the wall stands on the land of the appellant, and it was, by the lease under which Macdonell, the predecessor in title of the appellant, held from the predecessor in title of the respondents, expressly provided that it should stand on the northerly boundary of the land demised to Macdonell; and in the provision of the

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lease giving to the lessor the right to fit into the wall beams, etc., it is spoken of as the northern wall of Macdonell's building, and again in the provision for conveying away the water from the roof it is referred to as "his" (*i.e.*, Macdonell's) "building;" and the covenant by Macdonell to erect the building is that he shall erect it on the demised premises.

It is, however, provided that the lessor, Samuel Cline, is to be at liberty to make use of the wall "as a partition wall between the said building of the said James Macdonell and any structure said Samuel Cline may thereafter erect adjoining said building on the northern side thereof."

The effect of these provisions, taken in connection with that which follows, which reads thus, "And that the said Samuel Cline, for the purposes aforesaid, be at liberty to fit into the said northern wall of the James Macdonell building, beams, joists, sleepers, and such other timbers and other building materials of any kind as may be necessary for the purposes aforesaid," is to confer on the lessor the same right to use the wall as if it were a party wall, and, when it was so used, as it in fact was, by building into it the beams and joists of the lessor's building, it became an integral part and a necessary part of that building without which it would not stand.

This right to use the wall as a partition wall and of fitting into it beams, etc., conferred on Cline by the lease to Macdonell, is more than a mere easement, and, according to the *ratio decidendi* in *Consumers Gas Co. of Toronto v. City of Toronto* (1897), 27 S.C.R. 453, is an interest in the land itself.

According to the terms of the special Act, it is not incumbent upon the owner or occupant of a dwelling-house, shop, or building which encroaches on Pitt street to remove it off the street "until the rebuilding . . . or the repairing thereof to the extent of fifty per cent. of the then cash value thereof."

The respondents are not rebuilding, nor is their building being repaired, and the license conferred by the special Act is, therefore, still subsisting, and it is not open to the appellant, in violation of the covenant entered into by her predecessor in title, to pull down the wall; in other words, so long as the wall remains lawfully on the highway, she may not interfere with it so as to deprive the respondents of the benefit intended to be conferred on their predecessor in title by the lease to Macdonell.

The appeal should be dismissed with costs.

TEETZEL, J.:—I agree.

CLUTE, J. (dissenting):—This is an appeal from the judgment of Middleton, J., delivered on the 19th September, 1910, on a motion for an injunction, turned, by consent, into a motion for judgment.

There is no dispute about the facts.

By indenture of lease bearing date the 24th November, 1847, the trustees of St. John's Church, Cornwall, leased to one Cline part of lot No. 15 on the south side of Second street, having a frontage of 80 feet on Pitt street and 80 feet on Second street. By sublease dated the 1st April, 1872, Cline leased to one Macdonell part of the said premises, being a parcel of 32 feet on Pitt street by 80 feet deep. One of the provisions of the lease was that Macdonell should construct and erect upon the said premises so leased to him, within a reasonable time thereafter, complete and finish, a two-storey brick building in such a position that the front of the same on Pitt street shall be in a line with the corresponding front of the store of the said Samuel Cline, now erected upon the north-west corner of said lot No. 15, and that the northern wall of the said building, which shall extend 48 feet, shall stand upon the northern boundary of the lands and premises thereby demised; that the said wall shall be constructed so as to be firm and durable, and with a thickness of at least one and a half bricks, and without windows, doors, or other openings therein; that the said Samuel Cline shall be at liberty to make use of the said northern wall as a partition wall between said building of the said James Macdonell and any structure the said Samuel Cline may thereafter erect adjoining said building on the northern side thereof, and that the said Samuel Cline, for the purposes aforesaid, shall be at liberty to fit into the said northern wall of the James Macdonell building, beams, joists, sleepers, and such other timbers and other building materials of any kind as may be necessary for the purposes aforesaid, and that the said Samuel Cline shall be at liberty to build the said structure either concurrently with the erection and construction of the said buildings of the said James Macdonell, or at any such time or times thereafter as he may deem expedient.

Macdonell erected a building upon the premises so demised to him, and subsequently, but prior to the passing of the statute

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hereinafter mentioned, Cline erected a building upon his premises adjoining, making use of the northern wall of Macdonell's building, as provided for in the sublease.

Subsequent to the erection of the buildings, there was a survey made of the town of Cornwall, by which it was found that the buildings erected by Macdonell and Cline projected some 20 inches on what was found to be the street by that survey. The survey was affirmed and declared to be valid and binding on all parties by 47 Vict. ch. 50, which contains this provision: "Provided, that where any dwelling-house or shop in said part of said town had been, before the first day of January, in the year of our Lord one thousand eight hundred and eighty-three, partly built upon any street (as ascertained by the said survey), it shall not be incumbent upon the owner or occupant of such dwelling-house, shop, or building, to remove the same off such street until the rebuilding of such dwelling-house, shop, or building, or the repairing thereof to the extent of fifty per cent. of the then cash value thereof."

The plaintiffs and the defendant are now the owners in fee simple of the premises formerly owned by the said Samuel Cline and James Macdonell. The plaintiffs are the successors in title to the said Samuel Cline.

Early in the present year the premises owned by the defendant were destroyed by fire, but the said wall erected by Macdonell was not destroyed. The defendant has prepared plans and let contracts and is proceeding with the erection of a building upon her premises, and desires to take down that portion of the wall which encroaches upon Pitt street, according to said survey and statute. This action is brought for an injunction to restrain the defendant from so doing, the plaintiffs contending that, by the sublease above mentioned, they, through their predecessor in title, Cline, and by virtue of the provision contained in said statute, are entitled to have the portion of the said wall projecting on the street remain.

Middleton, J., found that "the effect of the statute was to operate as a legislative sanction to the buildings erected at the date of the Act in question remaining upon the street, and that the wall in question was a party wall, and constituted an integral part of each building, and may be maintained so long as either building is entitled to remain upon the strip of land in question.

The plaintiffs and defendant, as successors of Cline and Macdonell, respectively, are bound by the terms of the agreement, and neither is at liberty to set up as against the other that the wall in fact trespasses upon the highway. If such facts exist as to have brought the plaintiffs' license to occupy to an end, the building has become a nuisance, and may be abated as a nuisance, or the municipality may maintain ejectment (*City of Toronto v. Lorsch, supra*), but the defendant has no right herself to destroy the wall. The plaintiffs are entitled to the injunction and to costs, which I fix at \$80."

In *Watson v. Gray*, 14 Ch. D. 192, Fry, J., points out that the words "party wall" may be used in four different senses: "They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford* (1827), 1 Man. & Ry. 404, and *Cubitt v. Porter* (1828), 8 B. & C. 257, 265. I think that the judgments in those cases shew that that is the most common and the primary meaning of the term. In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts v. Hawkins* (1813), 5 Taunt. 20. Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the Building Acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety." In the *Watson* case it was by deed agreed and declared "that the north and south gables and walls of the said messuage or dwelling-house and hereditaments hereby conveyed shall be and remain party walls, and that the eastern and western walls and the pallisades in front of the said messuage or dwelling-house shall belong exclusively to the said Jane Lyons, her heirs and assigns." Fry, J., reached the conclusion that the wall there in question "must be considered as belonging to the plaintiff and the defendant as tenants in common, first, because the cases shew that this is the most ordinary meaning of the words, and, secondly, because in the conveyance . . . a party wall is contrasted with a wall belonging exclusively to one owner."

In the present case the lease expressly provides that the northern

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wall of the proposed building to be erected by Macdonnell shall stand upon the northern boundary of the lands and premises thereby conveyed.

The defendant, it is admitted, is now the owner of this land in fee, subject to whatever right was acquired by the plaintiffs' predecessor in title in respect of the wall, under the clause above quoted in the sublease of the 1st April, 1872. The term "party wall" is not used in that instrument: the provision is that the said Cline, the plaintiffs' predecessor in title, shall be at liberty to make use of the northern wall as a partition wall between the said building to be erected by Macdonnell and any structure which Cline may thereafter erect adjoining the said building on the northern side thereof, and that Cline, for such purpose, shall be at liberty to fit into said northern wall of the James Macdonnell building, beams, joists, etc., as may be necessary for the purposes aforesaid.

I am of opinion that, having regard to the language used in the sublease, the parties are not tenants in common of the wall, but that the plaintiffs, as the owners of the adjoining land, are entitled to an easement therein as defined by the sublease of the 1st April, 1872.

Then, what was the limit of that easement? It could have no relation to the street or to the portion of the wall extending upon the street. It must now be taken, under the statute, that the survey above referred to fixes the true line of the street, and that, therefore, both parties encroached upon the street to the extent of 20 inches; the defendant's predecessor in title permitting the plaintiffs' predecessor in title to use the 20-inch wall so built upon the street for the purposes of support. No claim is made by possession, nor could the same be so made, in my opinion, under the facts in this case. It must now be assumed, I think, that both parties extended their building beyond the street-line by mutual mistake. The defendant's building having been destroyed by fire, he now desires to rebuild the same. This has relation to the portion of the wall which, in my view, belongs to him. I agree with my brother Middleton that the defendant's building, to the extent of its encroachment, has become a nuisance, and may be abated as a nuisance, or the municipality may maintain trespass. In such case, however, I am unable to agree that the defendant has no right to remove the wall to avoid the nuisance.

The plaintiffs can make no claim except under the clause in the sublease, and that clause has only relation to a building erected upon the land described in the sublease. There was no easement in respect of any building erected or to be erected upon the street, and there is no title, in my opinion, to the same shewn by the plaintiffs. It is not indeed incumbent, in the words of the statute, upon the plaintiffs to remove their building; but it is incumbent upon the defendant to remove his building, and in removing his building it necessarily follows that he must withdraw the support which the plaintiffs' building had in respect of the 20 inches, but to which the plaintiffs had no title.

With deference, I think the judgment for the plaintiffs should be reversed, and the plaintiffs' action dismissed with costs below and of this appeal.

Appeal dismissed, CLUTE, J., dissenting.

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Will—Absence of Undue Influence—Testamentary Capacity—Insane Delusions—Failure of Proof of Existence—Effect on Disposition of Property.

The rule laid down by the Judicial Committee in *Waring v. Waring* (1848), 6 Moo. P.C. 341, that any act done by a person whose mind is unsound on one subject, however rational that act may appear to be, is void, as it is the act of a morbid or unsound mind, no longer prevails.

Since *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, the rule has been that no insane delusion shall influence the will of the testator in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made. It is a question for the jury whether the delusion affected the disposition.

Skinner v. Farquharson (1902), 32 S.C.R. 58, followed.

And in a case in which it was found that there was no undue influence, and the testatrix understood the nature and effects of her act in making a will, the extent of the property disposed of, and the claims to which effect should be given, her will—duly executed in accordance with the law—was upheld, in spite of evidence of insane delusions as to the unchastity of her daughters and other relatives and as to attempts on their part to poison her—those delusions, if they really existed, not having affected the disposition of her property.

And held, upon the evidence, that the testatrix was not in fact the victim of the delusions of which evidence was given, but affected to believe evil of persons about her and expressed her affected belief in order to annoy them.

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November 4. The action was tried before RIDDELL, J., without a jury, at Brampton.

W. H. McFadden, K.C., for the plaintiff.

H. D. Petrie and *W. V. M. Shaver*, for the defendant Edward McIntee. *

T. J. Blain, for the defendant J. S. McIntee.

November 5. RIDDELL, J.:—This is an action for proof of a will in solemn form, removed into the High Court from the Surrogate Court of the County of Peel.

The testatrix was a widow who died in the present year, aged about 85 or 86, and the will of which probate is asked was made on the 23rd May, 1907.

The objections taken are two in number: first, the want of testamentary capacity; and, second, alleged undue influence on the part of the plaintiff, one of her sons. The latter charge is wholly unfounded, no attempt was made at the trial to support it and it should never have been made. The former presents more difficulty.

The testatrix had had seven children: Elizabeth Coalhurst, married, of Maryland, U.S.A.—it does not appear whether she is living or dead, but I made an order that she (or her representatives) should be represented in the action by another daughter, Mrs. Montgomery; John Spencer McIntee, who is a beneficiary under the will and is named as an executor therein—he did not join in applying for probate, for a reason which will appear later, and he took at the trial a neutral position; William James McIntee, the plaintiff; Mary Victoria McIntee, an unmarried daughter, made a defendant; Emeline Montgomery, wife of John Montgomery, of Montreal, who gave evidence at the trial and repudiated any idea that she should share in the estate; Edward McIntee, who now calls himself Edward McIntyre, and who is the active contestant of the validity of the will. There was another son, said to have been a favourite child, who died some years ago by accidental chloroform narcosis—the death of this son is said to have much affected his mother, and she frequently thereafter said that he had been murdered—she did not accuse any of her children of the “murder,” and I think all she meant was that he should not have died when he did, and that some one had been careless.

All the living children, except Mrs. Coalhurst (if indeed it is

proper to speak of her as living), gave evidence, which I think was honest, at the trial, for, although two at least, Mary Victoria McIntee and the defendant, shewed strong feelings of resentment at the way in which their mother had disposed of the property, I cannot find that even they allowed their feelings to master them to so great an extent that they testified to what they knew to be untrue. The evidence of John S. McIntee was somewhat confused, but it cannot be said that he consciously coloured what he deposed to; Mr. and Mrs. Montgomery gave their testimony in a clear and careful manner, and nothing indicated that any of the other witnesses had any desire to say anything but the exact truth as they understood it.

In a case of this kind "the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator:" *Barry v. Butlin* (1838), 2 Moo. P.C. 480, 482.

What constitutes a capable testator is laid down by Cockburn, C.J., in the great case of *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, at p. 565: "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

So far as concerns understanding the nature of the act and its effects, the extent of the property disposed of, the claims to which effect should be given, there can be no doubt about the full capacity of the testatrix—indeed the defendant Edward, who has caused the present action, testifies that he subsequently made an arrangement with his mother that she should make a will in his favour, he to keep her for the rest of her life. This agreement fell through on account of the death of the testatrix.

There is no contest upon the matter of the capacity—it was in effect admitted that, were it not for what are alleged to be delusions, the testatrix was fully competent. I do not know whether at any

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time the defendant may take any different position—in any case I find as a fact that (not considering now the effect of the alleged delusions) there can be no question that the testatrix was competent to make a will when and as she did. Nor can there be any controversy that she fully understood the will—Mr. Morphy's evidence is to be accepted, and it is quite conclusive; as little question can there be that the will was duly executed in accordance with the law.

It is asserted that she suffered from two kinds of delusion. She laboured under the delusion that all women were "bad." But then she was no worse in that respect than the English satirist, for he, not content with saying, "Most women have no characters at all," went further and said, "Every woman is at heart a rake." The Frenchman had the same opinion—"Toutes êtes, serez, ou fâtes, de fait ou de volonté, putain." No one has ever suggested that either Pope or De Meung was insane, or had delusions, because of such an opinion, although each was not quite orthodox in other matters as well. "It is not the law that any one who entertains wrong-headed notions . . . cannot make a will:" *per* Taschereau, J., in *Skinner v. Farquharson* (1902), 32 S.C.R. 58, at p. 60.

Following out this idiosyncrasy, the testatrix, in the later years of her life, seems to have had no hesitation in charging her daughter who lived at home with her, Mary Victoria, with improper designs upon the hired men, in charging her sons John and William with improper conduct with her grandchild, their niece, then on a visit to her grandmother—even going so far as to suggest immorality between brother and sister. I do not find that her son Edward was ever accused of such conduct—it may be because he, having received an education at the expense of his parent, had left home and was doing for himself—nor were the married daughters in Maryland and Montreal subjected to this annoyance, probably for the same reason:

The second kind of delusion alleged is that of poisoning, etc. No doubt, she did, in 1905-6, accuse her daughter Mrs. Montgomery of trying to poison her, and Mrs. Montgomery's young son of sticking pins in her at night. These accusations were made during a visit by her to her daughter, and were quite without foundation in fact.

The life of her daughter Mary Victoria was made wretched by constant repetition of the accusation that she was trying to

poison her mother; and more than once the old lady threw articles at her, regardless of their dangerous character.

The testatrix was a woman of a "nasty" disposition, liked to annoy those who should be dear to her and had a quick and ungovernable temper. From what I saw of her daughter Mary Victoria in the witness-box, I am satisfied that in the many wrangles between mother and daughter, the mother did not always come off first best. I am satisfied, too, that the missiles thrown made their appearance only when the elder woman had given way to an excess of passion, and that they were intended as a last argument when words had failed to give her the victory.

The accusations made against her children of sexual immorality were in large measure, if not wholly, due to her desire to annoy them, and I do not think she really believed in their guilt. Had she done so, she would, one would think, have prevented any chance of repetition of the offences by refusing to allow them all to live in her house together. Whether this supposition be correct or not, I think that she undoubtedly had no real belief that either daughter was trying to poison her, or in the vice of son or daughter. She remained in the house of her daughter in Montreal after the supposed attempt, although she did on one occasion threaten to leave the house and dressed herself for that purpose, and it is said she denied herself food so that she became run down. Then in her own home, although she time and again charged her daughter Mary Victoria with trying to poison her, and had repeated battles royal with her, she kept her in the house in charge of the cooking, etc., and went to her from time to time for food when she got hungry. It must not be lost sight of that no one outside of the family heard anything about the poisoning, etc.; had the testatrix really entertained the idea that her daughters were trying to poison her, it is to be expected that she would have said something about it to neighbours or doctor.

I am unable to find as a fact that the deceased did have any delusions; but find the contrary as a fact.

If I had been able, upon the evidence, to find the alleged delusions proved—and, I repeat, it is not their desire to tell what the witnesses understood to be the truth that I at all doubt—it would become necessary to consider how the case would then stand.

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The law as to testamentary capacity in cases in which the testator suffered from delusion is not the same as it was formerly laid down.

No longer ago than about the middle of the last century, in the well-known case in the Privy Council of *Waring v. Waring* (1848), 6 Moo. P.C. 341, at pp. 349 *sqq.*, the philosophic Lord Brougham, who was supposed to know everything, even a little law, says: "We must keep always in view that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible; . . . We, therefore, cannot, in any correctness of language, speak of general or partial insanity. . . . If the being, or essence, which we term the mind, is unsound on one subject . . . it is quite erroneous to suppose such a mind really sound on other subjects. It is only sound in appearance . . . it is as absurd to speak of this as a really sound mind (a mind sound when the subject of the delusion is not presented), as it would be to say, that a person had not the gout, because his attention being diverted from the pain . . . he, for the moment, was unconscious of his visitation. It follows . . . that no confidence can be placed in the acts, or in any act, of a diseased mind, however apparently rational that act may appear to be, or may in reality be . . . because we have no security that the lurking delusion, the real unsoundness, does not mingle itself with, or occasion, the act." And the Judicial Committee accordingly decided that any act done by a person whose mind is unsound on one subject, however rational that act may appear to be, is void, as it is the act of a morbid or unsound mind (see head-note on p. 341).

The same rule was laid down by Lord Penzance in *Smith v. Tebbitt* (1867), L.R. 1 P. & D. 398.

But the case already mentioned of *Banks v. Goodfellow*, L.R. 5 Q.B. 549, made its quietus for that doctrine, and the rule is as I have already quoted it. This case has never been questioned, but it has been steadily and consistently followed, both in England and here. Only a few of the cases are: *Boughton v. Knight* (1873), L.R. 3 P. & D. 64; *Ingoldsby v. Ingoldsby* (1873), 20 Gr. 131; *Bell v. Lee* (1883), 8 A.R. 185.

While there are expressions in some of the cases that the will must be held void if the testator suffered from a delusion "capable of influencing the result" and the like, the rule seems to

be laid down by our Supreme Court that "it is a question for the jury whether the delusion affected the disposition . . ."

In *Skinner v. Farquharson*, 32 S.C.R. 58, Taschereau, J., says (p. 60): "If the deceased's delusions had influenced the disposal of his property, the respondent's contention should perhaps prevail. But that is a question of fact. . . ." Davies, J. (p. 86), cites *Jenkins v. Morris* (1880), 14 Ch.D. 674, where the head-note says: "It is a question for the jury whether the delusion affected the disposition or contract;" and goes on thus: "In that case the jury reached their conclusion that the delusion did not affect the capacity of the lessor to grant the lease . . . The question to be determined was, as put by Baggallay, L.J., 'What influence had the insane delusion by which P. (the lessor) was affected, upon the particular transaction in respect to which it is alleged that he was incompetent to act? . . .' Now," continues Mr. Justice Davies, "I am of opinion that these common-sense principles, if applied to the case at Bar, solve the question in dispute." And at p. 92: "It was not only a rational will, that would not be enough, but going below the surface and considering the circumstances and conditions under which it was made, the amount and nature of the property he had to dispose of, the interest of those who by personal relationship had claims upon him, I cannot find anything in it to shew me that any disorder of his mind had poisoned his affections, perverted his sense of right, or prevented the exercise of his natural faculties, much less that any insane delusion had brought about a disposal of his property which he otherwise would not have made." The Supreme Court, quite recognising, on the authority of *Smee v. Smee* (1879), 5 P.D. 84, *Banks v. Goodfellow* (*supra*) and similar cases, that the burden of proof was upon the proponent to prove that the testator was competent and of sound mind at the time of the making of the will, and notwithstanding the vigorous dissent of Sedgewick, J., who adopted the written opinion of Mr. Justice Gwynne, then but recently deceased, reversed the Supreme Court of Nova Scotia, and reinstated the decree of the Judge of Probate for the County of Halifax.

Whatever may be the law elsewhere, I think I am bound by authority to go into the question—not, could the "delusions" possibly have an influence upon a disposition to be made by the testatrix by will?—but, did the "delusions" influence or affect the disposition actually made?

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The property to be disposed of may first be considered.

She had, under the will of her husband, a life estate in the farm, "at her death to become the property of such of my surviving sons as she may consider the most worthy, and to whom she may give and bequeath the aforesaid freehold estate to be and become his or theirs, his or their heirs, successors, administrators, and assigns forever." The will had left to her all "my plate, household furniture, farm implements, farm stock," etc., absolutely; but at the time of her death the defendant's witness J. S. McIntee proves that she had no farm stock or implements—indeed it is because this son thought that her will disposed of his stock and implements that he objected to the will. Practically all she could dispose of was the farm under the powers given in her husband's will, and that only to a son or sons. It would seem—though this was not perhaps legally proved—that she had once made a will whereby the three surviving sons, John, William, and David, would share the farm equally. In the will propounded she, after reciting the power in her husband's will, directs that the farm is to go to John and William in equal shares, as well as her farm stock and implements, they to pay \$500 within three years to Mary Victoria, and all the residue of her estate was to go to Mary Victoria.

As to the sons, there is no evidence that she had any adverse feeling—much less any delusion—in respect of Edward. William, she was always quarrelling with, and she had accused him of immorality with his niece; John, she had accused of the like misconduct; and yet she took away all from the blameless and favoured son and gave more to those charged with crime. "Such dispositions cannot have been the offspring or result of this delusion. On the contrary, the inference from them is that the delusion cannot have been in actual operation at the time" *per* Taschereau, J., in *Skinner v. Farquharson*, 32 S.C.R. 58, at p. 60.

As to the bequests to Mary Victoria—Mrs. Coalhurst had been married and away from home and country for many years—Mrs. Montgomery also—Mary Victoria, the sole remaining daughter, had been charged with vice and crime time and again, and, if the testatrix really did not in fact, and notwithstanding her charges against her daughter, have any delusion, what more natural than the legacy of \$500 and of everything except what belonged to the farm? And what more unnatural, if she had any such delusion, than giving

to the wicked daughter property in preference to the innocent son Edward or the equally innocent daughter in Maryland? Mary Victoria complains that she had to take care of her mother, and yet was left with almost nothing. In the first place, the mother had no right to charge the land at all, and it is probable that she left the sum of \$500 to be paid by the two sons rather in the hope that they would pay it than with the idea that they were bound to do so. In the second place, the sum of \$500—the whole of £125 currency—was no small sum to the old pioneer, the citizen of Canada of the preceding generation. Money was not always so plentiful and so little worth as at present, and in the youth of the testatrix \$500 was no trifling dowry for any woman. And, lastly, she gave her daughter who had stayed at home and looked after her, practically if not indeed absolutely all she could.

It seems to me impossible to think that any delusion such as is sworn to could have influenced this will; and, consequently, if the inquiry be whether the delusion were capable of influencing the will, I must and do find that, even if the testatrix in reality had the delusions she affected to have, they were not capable of affecting her disposition of the property.

The will must be declared valid and admitted to probate.

As to costs, the plaintiff will have his costs as executor between solicitor and client, as will all the defendants except Edward. Had he not made the charge of undue influence, I should have given him the same costs; in view of that charge, it would be regular to order that he be paid no costs, but, under the circumstances, he may have his costs party and party. All these costs will be paid out of the land in the hands of the plaintiff and John Spencer McIntee.

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[IN THE COURT OF APPEAL.]

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SELKIRK V. WINDSOR ESSEX AND LAKE SHORE RAPID R.W. CO.

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Company—Electric Railway Company—Powers of Provisional Directors—Special Act, 1 Edw. VII. ch. 92, sec. 9 (O.)—General Electric Railway Act, sec. 44—Payment for Services Rendered in Furtherance of Undertaking—Implied Power—Contract under Seal—Sanction of Shareholders—Performance—Acceptance—Liability of Company—Appeal and Cross-appeal—Costs.

Section 9 of the special Act, 1 Edw. VII. ch. 92 (O.), incorporating the defendant railway company, is an enabling enactment, enlarging the powers of the provisional directors, and authorising them to act for and on behalf of the company to an extent much beyond the scope to which provisional directors are limited by sec. 44 of the Electric Railway Act, R.S.O. 1897, ch. 209. The language of sec. 9 distinctly implies that the provisional directors are authorised, with the sanction of the shareholders, to engage the services of promoters or other persons for the purpose of assisting them in furthering the undertaking; and the power to engage services implies the power to pay or agree to pay for such services. The services of the plaintiffs which were engaged under the agreement sued upon were within the class of purposes requiring the sanction of the shareholders if the agreement had been to pay in paid-up stock or bonds. If the sanction of the shareholders was necessary in order to make the agreement binding upon the company, it was given in substance.

Monarch Life Assurance Co. v. Brophy (1907), 14 O.L.R. 1, distinguished.

Apart from these considerations, the agreement being under the seal of the company, and the services having been rendered in fact by the plaintiffs and accepted in fact by the company, there was ample consideration to support the claim against them for the sum mentioned in the agreement.

Lawford v. Billerica Rural District Council, [1903] 1 K.B. 772, and *Township of East Gwillimbury v. Township of King* (1910), 20 O.L.R. 510, followed.

Judgment of a Divisional Court, 21 O.L.R. 109, affirmed.

The defendant company having appealed from the judgment against them, and the plaintiffs, as the direct result of the company's appeal, having appealed from the dismissal of the action as against the individual defendants, both appeals were dismissed with costs, but the company were ordered to pay to the plaintiffs the costs to be paid by the latter to the individual defendants.

APPEAL by the defendants the railway company and cross-appeal by the plaintiffs from the decision of a Divisional Court, 21 O.L.R. 109, reversing the judgment of RIDDELL, J., 20 O.L.R. 290, and directing that judgment be entered for the plaintiffs against the defendants the railway company, but setting aside the judgment entered by RIDDELL, J., against the defendants Newman and Nelles.

September 23. The appeals were heard together by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. M. Pike, K.C., for the defendants the railway company.
By the provisions of the Act of incorporation of the railway com-

pany, 1 Edw. VII. ch. 92 (O.), the several clauses of the Electric Railway Act, R.S.O. 1897, ch. 209, are incorporated with and made part of the Act of incorporation, and the provisions of sec. 52 of the Electric Railway Act, at the time of making the agreement in question, had not been carried out. Therefore, Newman and Nelles had no authority from the company to enter into an agreement so as to bind the company. The agreement was never made known to the shareholders of the railway company, and the railway company never ratified nor adopted the agreement, which would be necessary in order that the company should be bound thereby: *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366. The provisional directors had no power under the special Act of incorporation or under the Electric Railway Act, or otherwise, to authorise the making of the agreement: *Michie v. Erie and Huron R.W. Co.* (1876), 26 C.P. 566; *In re North Simcoe R.W. Co. and City of Toronto* (1874), 36 U.C.R. 101, at p. 119; *Monarch Life Assurance Co. v. Brophy* (1907), 14 O.L.R. 1; *Corporation of Whitby v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 480; *Cherry v. Colonial Bank of Australasia* (1869), L.R. 3 P.C. 24; Jacobs on the Railway Law of Canada, pp. 86, 92, 96, 144, and 145; English cases cited in Buckley's Companies Acts, 9th ed., pp. 625, 635; Lindley's Law of Companies, 6th ed., pp. 351, 352. As to the limited powers of a statutory corporation, these are dealt with in *Corporation of Whitby v. Grand Trunk R.W. Co.*, *supra*. The agreement was made, if at all, by Newman and Nelles, on their own account and without any consideration, at a time when the plaintiffs' charter had expired, and no benefit accrued or could accrue to the railway company.

A. H. Clarke, K.C., for the plaintiffs. The provisional directors were empowered by the Act of incorporation of the defendant company, 1 Edw. VII. ch. 92, sec. 9, to bind the company by the contract in question, which was made for good and valuable consideration, especially as such contract was sanctioned by all the shareholders existing at the time of the making thereof. The railway company accepted the benefit of the services performed by the plaintiffs. In the event of a finding that the individual defendants were not authorised to bind the company, the plaintiffs submit that the judgment of the trial Judge against the individual defendants be restored, for the reason that, both by the terms of

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the written contract and verbally, the individual defendants represented to the plaintiffs that they had authority to bind the company: *Collen v. Wright* (1857), 8 E. & B. 647; *Halbot v. Lens*, [1901] 1 Ch. 344; *Yonge v. Toynbee*, [1910] 1 K.B. 215, at p. 232.

E. S. Wigle, K.C., for the defendants Newman and Nelles. There never was any intention on the part of the plaintiffs or defendants that these defendants should be personally liable on the contract in question. It was intended by the plaintiffs and these defendants at the time of making the agreement that it should be binding on the company. The contract was *intra vires* of the provisional directors, under the provisions of sec. 9 of 1 Edw. VII. ch. 92, and, even if the formalities required by that section were not strictly complied with, the company, and not the directors, are liable: *Lindley on Companies*, 6th ed., vol. 1, pp. 218-226; *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; *McDougall v. Lindsay Paper Mill Co.* (1884), 10 P.R. 247, 252. Though the agreement was not sanctioned at a general meeting of the shareholders, yet it was ratified by all the shareholders, which, I submit, was sufficient. These defendants withdrew from the company before anything was done under the contract sued on, and any benefit accruing therefrom was for the company: *Bridgewater Cheese Factory Co. v. Murphy* (1896), 23 A.R. 66, 26 S.C.R. 443.

Pike, in reply.

November 7. The judgment of the Court was delivered by Moss, C.J.O.:—In this case there are two appeals from a judgment of a Divisional Court: the first by the defendants the railway company, with the plaintiffs as respondents; the other by the plaintiffs, with the defendants Newman and Nelles as respondents.

The plaintiffs brought action against both sets of defendants, seeking payment of \$1,000 upon the footing of an agreement set out in the statement of claim. They claimed that under the agreement the defendants the railway company were liable to them in the amount of \$1,000, and, in the alternative, if the defendants the railway company were found not to be liable, that the individual defendants, Newman and Nelles, should be compelled to pay.

The action was tried before Riddell, J., without a jury. He held that the defendants Newman and Nelles were, and that the defendants

the railway company were not, liable, and he gave judgment accordingly. Newman and Nelles appealed from this judgment to a Divisional Court, and the defendants the railway company were, by direction of the Court, notified of the appeal, and appeared and were represented by counsel upon the argument, and the plaintiffs renewed their contention that the defendants the railway company were liable to them, and that the learned trial Judge should have so found.

The Divisional Court reversed the judgment against Newman and Nelles and gave judgment in favour of the plaintiffs and ordered the railway company to pay the amount of the plaintiffs' claim.

The railway company thereupon appealed to this Court, and the plaintiffs, though quite content with the judgment against the railway company, were obliged as a measure of precaution to appeal against the judgment in so far as it reversed the judgment of the trial Judge against Newman and Nelles. The appeals were ordered to be, and were, argued together.

It is manifest that, if the judgment against the railway company stands, the plaintiffs' appeal must fail. The first question, therefore, is whether the defendants the railway company were rightly held by the Divisional Court to be liable to the plaintiffs.

The learned trial Judge determined that they were not liable, on the ground that, at the time when the agreement was made on their behalf, their affairs were being managed by the provisional directors named in their Act of incorporation, 1 Edw. VII. ch. 92, and that the provisional directors had not power to enter into such a contract: 20 O.L.R. 290.

The Divisional Court differed from the conclusions of the learned trial Judge because of sec. 9 of 1 Edw. VII. ch. 92, to which it is said his attention was not directed: 21 O.L.R. 109.

Section 9 is plainly an enabling enactment, no doubt inserted in the special Act for the express purpose of enlarging the powers of the provisional directors and enabling them to act for and on behalf of the company to an extent much beyond the scope to which provisional directors are limited by sec. 44 of the Electric Railway Act, R.S.O. 1897, ch. 209.

It is noteworthy that several Acts incorporating electric railway companies passed by the Legislature during the same session

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(1901) contain a precisely similar enactment, *e.g.*: ch. 78 (the railway company of which the plaintiffs were provisional directors), sec. 9; ch. 82, sec. 8; ch. 88, sec. 16.

It would seem to have been considered that, in regard to railways intended for urban or suburban service, the work of construction should not be wholly at a standstill pending the organisation of the company, and that, with a view to preventing delay in the prosecution of the undertaking, the provisional directors should be empowered to engage on behalf of the company in purchases and make bargains which otherwise they could not do.

The language of sec. 9 distinctly implies that the provisional directors are authorised to engage the services of engineers and contractors, to purchase right of way, material, plant, and rolling stock, and, with the sanction of the shareholders, engage the services of promoters or other persons for the purpose of assisting them in furthering the undertaking. And, as said by Lord Macnaghten in *S. Pearson & Son Limited v. Dublin, etc., R.W.*, [1909] A.C. 217, at p. 227: "A power to construct implies a power to pay for construction. A power to take land implies a power to pay for the lands which may be taken." In like manner a power to engage the services of persons for the purpose of assisting in the furtherance of the undertaking may well imply a power to pay or agree to pay for such services.

It is apparent that the powers thus expressly or impliedly conferred extend far beyond those possessed by the provisional directors whose actions were under consideration in *Monarch Life Assurance Co. v. Brophy*, 14 O.L.R. 1. It was there held that the provisional directors were restricted to withdrawing funds of the company for purposes of organisation only.

Section 44 of the Electric Railway Act confines the authority to the purposes of the company. But the purposes in respect of which the provisional directors may act for and bind the defendants the railway company are materially extended by sec. 9 of the special Act. Not only is there the power to pay or agree to pay in cash, which the power of purchasing right of way, etc., or engaging services, implies, but there is given a power of paying or agreeing to pay in paid-up stock or in the bonds of the company.

The services of the plaintiffs which were engaged under the

agreement sued upon were of such a nature as to be comprehended within the class of purposes requiring the sanction of the shareholders if the agreement had been to pay in paid-up stock or bonds. This power is an extension of the power to pay in cash derived from the combined effect of sec. 44 of the Electric Railway Act and sec. 9 of the special Act. If the sanction of the shareholders was necessary in order to make the agreement binding upon the defendants the railway company, it was given in substance, as pointed out by the Divisional Court.

Upon another ground also the defendants have been properly held liable. The learned trial Judge found expressly, upon evidence which fully justified his conclusion, that the plaintiffs had performed their part of the agreement. There is not the least doubt that the defendants the railway company accepted the benefit of the plaintiffs' services. The correspondence appearing in the evidence shews that the defendants the railway company accredited the plaintiffs, as their agents, to perform work of the kind mentioned in the agreement, and recognised and acknowledged the value of the services rendered.

That being so, there seems to be no good ground for saying that they are not liable to pay for them.

The agreement being under the seal of the defendants the railway company, and the services having been rendered in fact by the plaintiffs and accepted in fact by the defendants the railway company, there is ample consideration to support the claim against them for the sum mentioned in the agreement: see *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, and *Township of East Gwillimbury v. Township of King* (1910), 20 O.L.R. 510, where the authorities dealing with this principle are discussed in regard to agreements, whether under seal—as the one in question here is—or otherwise.

The railway company's appeal should, therefore, be dismissed with costs. It follows that the plaintiffs' appeal should also be dismissed, and the plaintiffs must pay to the defendants Newman and Nelles their costs; but, inasmuch as the appeal was the direct result of the appeal of the defendants the railway company, the latter should, in addition to the costs of their own appeal, pay to the plaintiffs the costs they are directed to pay to the defendants Newman and Nelles.

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BOURGON V. TOWNSHIP OF CUMBERLAND.

June 29.

Liquor License Act—Township By-law Limiting Number of Licenses—Time for Going into Operation—"Any Future License Year"—R.S.O. 1897, ch. 245, sec. 20—Application to Future Years—Restriction to Taverns—Repeal of Former By-law—Effect of Declaratory Judgment.

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Nov. 12.

On the 11th January, 1909, a township council passed a by-law enacting "that the number of licenses for the sale of intoxicating liquors be limited to three." This action was brought in April, 1910, to obtain a declaration that the by-law was void and of no effect:—

Held, that the words "for any future license year," in the Liquor License Act, R.S.O. 1897, ch. 245, sec. 20, mean "for any year future as regards the date of the by-law." This interpretation allows the council, if they are dealing with their own year, to deal at the same time with all succeeding years, without depriving the future councils of their power to deal with their years by altering or repealing the by-law. This by-law, being general, applied to the immediately succeeding license year, and to all future years until altered or repealed; and it was not necessary that it should state that it came into operation at the beginning of the then ensuing license year.

Re Wilson and Town of Ingersoll (1894), 25 O.R. 439, disapproved.

Re Brewer and City of Toronto (1909), 19 O.L.R. 411, followed.

2. That, although the kind of license was not specified, it should be read as applying to tavern licenses only, there being no shop licenses in the township.

3. That the previously existing by-law, restricting the number of licenses to seven, was repealed by this by-law, being inconsistent with it, though words of repeal were not used.

Semble, that such a declaration as sought should not, in any event, be made, as, before the time came for the issue of another set of licenses, a perfect by-law could be passed by the council.

ACTION for a declaration that a certain by-law of the defendants limiting the number of licenses for the sale of intoxicating liquors in the township was void and of no effect.

June 22. The action was tried before BOYD, C., without a jury, at Ottawa.

F. B. Proctor, for the plaintiff.

A. E. Fripp, K.C., for the defendants.

June 29. BOYD, C.:—*Re Wilson and Town of Ingersoll* (1894), 25 O.R. 439, cited to shew that this by-law is bad because it does not shew for what year it was to be applicable, has not been favourably commented on in later decisions: see *per Osler, J.A.*, in *Dwyre v. Ottawa* (1898), 25 A.R. 121, at p. 128; *Re Kelly and Town of Toronto Junction* (1904), 8 O.L.R. 162, at p. 167; and *Re Dewar and Township of East Williams* (1905), 10 O.L.R. 463, at p. 467. I do

not think it is binding upon me, so that I could hold this by-law to be ineffective because of indefiniteness as to its time of operation.

This by-law was passed on the 11th January, 1909, and enacts "that the number of licenses for the sale of spirituous liquors be limited to three." I take it that its plain and obvious meaning is that that restriction should begin to operate for the next license year beginning on the 1st May ensuing—and so on until it was altered or repealed.

The by-law previously in force, passed on the 3rd February, 1890, restricted the issue of tavern licenses to seven for the township, and it continued in force till superseded by the by-law now attacked. I think the opinion given by the chief officer of the license department at Toronto is correct, in which it is said: "It is not absolutely necessary to repeal the previous by-law in terms, but, if a subsequent by-law is passed which is inconsistent with the former by-law, it will have the effect of repealing the former."

The by-law speaks from its promulgation, and applies to the coming license year for which the municipality had power to prescribe limitations; and these limitations will continue into future years unless its operation is confined by the language used: *Re Brewer and City of Toronto* (1909), 19 O.L.R. 411.

The most formidable objection is that it is vague because it does not specify that it applies to taverns only or to taverns in particular. As it stands, it is warranted by sec. 20 of the Liquor License Act, R.S.O. 1897, ch. 245; but it is said that it may be enacted under sec. 32, which applies to shop licenses. The answer is, on the facts as proved at the trial, that there are no other licenses relating to spirituous liquors in the township except tavern licenses. This state of facts the corporation and the ratepayers were cognizant of, and so no one interested could mistake the scope and operation of the by-law. The maxim *id certum est* may be invoked to overcome this objection.

No other points were discussed, and as against these—even though the applicant had moved promptly—the by-law should be supported.

Action dismissed with costs.

The plaintiff appealed from the judgment of BOYD, C.

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November 4. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

A. R. Clute, for the plaintiff. The by-law is defective in not shewing the year to which it is applicable: *Re Wilson and Town of Ingersoll*, 25 O.R. 439. The trial Judge says that that case has not been favourably commented on in later decisions, but those cited by him do not apply to the decision of Robertson, J., in the *Wilson* case, upon the point he is dealing with at p. 443, which has never been overruled. The by-law is also bad by reason of the uncertainty of its subject-matter, as it might apply either to tavern or shop licenses. The by-law should be clear on its face, and must be strictly construed: *In re Hassard and City of Toronto* (1908), 16 O.L.R. 500, 506. The following cases were also referred to: *Re Brewer and City of Toronto*, 19 O.L.R. 411, 416, 417; *Re Dewar and Township of East Williams*, 10 O.L.R. 463, 467.

A. E. Fripp, K.C., for the defendants, stated that he relied on the reasonings of the trial Judge, which were conclusive. No shop licenses had ever been granted in the township, so no person could possibly have been misled. The defendants had been prejudiced by the plaintiff's delay, and the Court should not give him the declaration he asked for, that being a matter within its discretion.

Clute, in reply.

November 12. RIDDELL, J.:—In the township of Cumberland there were four tavern licenses and no shop licenses; on the 11th January, 1909, the council passed a by-law in these terms: "The Municipal Corporation of the Township of Cumberland in council assembled this 11th day of January, 1909, enacts that the number of licenses for the sale of intoxicating liquors be limited to three." There is no pretence that the council had or could have in mind any other than tavern licenses.

The plaintiff had been one of the four license-holders, and he applied for a license in 1909, but the Commissioners did not renew his license, allowing him, however, till August, 1909, to dispose of his stock.

There seems to have been some discussion in April, 1909, as to the validity of the by-law, and the opinion of the chief officer at Toronto of the license branch was asked and given.

In April of the present year the solicitor for the plaintiff threatened proceedings to have the by-law declared invalid, and, no answer having been given, this action was brought.

As the only result of this action (if the result should be favourable to the plaintiff) would be a declaration that the by-law is invalid, and as, before the time came for the issue of another set of licenses, a perfect by-law could be passed by the council, I do not, as at present advised, think we should, in any case, allow the appeal and make such declaration.

But, on the merits, the judgment appealed from is right. Section 20 of R.S.O. 1897, ch. 245, reads: "The council . . . may by by-law . . . limit the number of tavern licenses to be issued . . . for the then ensuing license year beginning on the 1st day of May or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by this Act." The words "for any future license year" admit of two interpretations. They may mean "for any year future as regards the date of the by-law;" or they may mean "for any year future as regards the then ensuing license year" mentioned in the section. While, if the words of a statute are clear and unambiguous, they must be given full effect to, no matter what absurdities and inconveniences may result—where the words admit of more than one interpretation, that which will not result in absurdity or inconvenience is to be preferred. If the latter were the true interpretation, the result would be that a council elected for 1909 would, without saying a word about the number of licenses for that year, be allowed to fix the number of licenses for the years 1910 and 1920. The former interpretation allows the council, if they are dealing with their own year, to deal at the same time with all succeeding years, without depriving the future councils of their power to deal with their years by altering or repealing the by-law.

The interpretation put upon the section by Mr. Justice Robertson in the one sense in *Re Wilson and Town of Ingersoll*, 25 O.R. 439, at p. 443, is authoritatively disapproved by the Court of Appeal in *Re Brewer and City of Toronto*, 19 O.L.R. 411. At pp. 416, 417, Osler, J.A., says that the section enables "the council to do one of two things, namely: to pass a by-law (1) limited . . . to the then ensuing license year, which will come to an end, *ex vi termini*, at the end of that year, leaving the next succeeding license

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year to be provided for, if at all, by a new by-law to be passed before the 1st day of March next before its commencement; or (2) a general by-law applicable to any future license year, commencing with the 1st day of May after its passage;" and "the expression 'any future license year' plainly means 'all' future license years," and "it is to such a general or standing by-law . . . that the words 'until such by-law is altered or repealed,' apply . . . A by-law to limit the issue of licenses for any future license year necessarily includes the then ensuing license year . . . as well as subsequent license years, and a by-law so expressed, without specifically mentioning the then ensuing license year, would have well attained the object aimed at, namely, a general or continuing by-law to remain in force until altered or repealed. . . ."

The result is inevitable—if a by-law contains words whose effect is to cause the by-law to come to an end at the termination of the then succeeding license year, it will so come to an end; but, if not, the by-law is general, and applies to all years future as to the date of passing the by-law, until it is altered or repealed. But in any case a limiting by-law must have effect in the then succeeding license year. A limiting by-law, therefore, as it must (if it become effective at all) come into operation at the beginning of the then ensuing license year, does not need to state that fact—there is no need of specifying what the law itself specifies. As well might an objection be taken to an indictment for murder because it did not state that the murdered man was dead at the time the bill was found, the law implying that fact by the word "murdered;" or object to a by-law because it was not in terms limited to the municipality. The present by-law then is a good general or standing by-law so far as this objection is concerned.

The objection that the kind of license is not specified, and, for all that appears on the face of the by-law, it may include shop licenses, is equally untenable.

In *Walker v. Stretton* (1896), 12 Times L.R. 363, the Warwickshire County Council had passed a by-law that a person driving shall, from a certain time to another, carry a lamp lighted and attached to his vehicle. The magistrates trying an alleged offender against this by-law found that the by-law was unreasonable and bad, as it applied to all places, and was not restricted to public highways. On an appeal, the Lord Chief Justice, Lord Russell

of Killowen, said that, although it was desirable that by-laws should be so free from doubt that "he who runs may read," yet, as this, even in the case of higher legislative bodies, was not always attained, the Court should strive so to construe the by-law as to give reasonable effect to the object aimed at; and, as he thought that it was possible to read the by-law as applying only to persons driving along the highway, the by-law was sustained, and the appeal allowed. See also *The Queen v. Saddlers' Co.* (1863), 32 L.J.Q.B. 337, at p. 360, *per* Lord Wensleydale.

In the present case it is possible to read the by-law as applying only to tavern licenses; and I am of opinion that that should be done.

The conclusion arrived at does not conflict with anything decided in *In re Hassard and City of Toronto*, 16 O.L.R. 500—in that case the majority of the Court thought it impossible to read the by-law in such a way as that it would be effective.

The objection that the former by-law was not repealed is answered by "the well-known principle of law, that if an Act of Parliament is passed containing clauses which are repugnant to and inconsistent with prior legislation, the Legislature cannot have two minds at one and the same time, and therefore the subsequent mind must alter the first mind:" *per* Field, J., in *Brown v. Great Western R.W. Co.* (1882), 9 Q.B.D. 744, at p. 753. Of course, this principle is as old as the law itself (Co. Litt. 112); and it applies to inferior legislatures as well as to the Imperial Parliament, and not less so to municipal councils than any other.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

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LONDON AND WESTERN TRUSTS CO. V. GRAND TRUNK R.W. CO.

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Nov. 12.

Fatal Accidents Act—Death of Young Man Caused by Negligence—Pecuniary Loss of Parents—Reasonable Expectation of Benefit—Damages—Jury—Evidence—Excessive Amount—Duty of Appellate Court—New Assessment.

A lad of twenty, a brakeman employed by the defendants, was killed in a collision upon the railway, by reason of the negligence of the defendants' servants, and this action was brought under the Fatal Accidents Act, R.S.O. 1897, ch. 166, by the administrators of his estate, to recover damages for his death, for the benefit of his parents, who lived in England. The claim was made and the assessment of the damages was based upon the principle of the Workmen's Compensation for Injuries Act. The jury found that the estimated earnings of a person in the same grade as the deceased, in the like employment, in this Province, for the three years allowed by the statute, would be \$1,800, and they assessed the damages at that sum, apportioning them between the father and mother. The evidence shewed that the deceased was unmarried; had been about four years in Canada, and about a month in the service of the defendants. He had corresponded with his mother, but had sent his parents no money. He had received a good and rather expensive education, at his father's expense, and the father swore to an understanding between the son and the parents that the son would, in consideration of the large sum so expended, assist the parents in their old age:—

Held, that the plaintiffs' right of recovery was limited in amount to the pecuniary loss which it could be fairly and reasonably found that the parents had suffered by the son's death; and, upon the evidence and in all the circumstances, taking into account the uncertainties and contingencies, there was such a reasonable and well-founded expectation of pecuniary benefit as could be estimated in money so as to become the subject of damages; but, having regard to all these matters, the award of damages was excessive and extravagant, and therefore unreasonable; and there should be a new assessment of damages, unless the parties could agree upon some amount.

It is the plain duty of the Court to see that an award of damages, in an action of this kind, which appears to have been arrived at upon considerations not warranted by the evidence, shall not stand.

Principles upon which damages to be assessed pointed out.

APPEAL by the defendants from the judgment of MAGEE, J., at the trial, in favour of the plaintiffs, upon the findings of a jury, in an action brought by the plaintiffs, as administrators of the estate of Cecil Burchell, deceased, under the provisions of the Fatal Accidents Act, R.S.O. 1897, ch. 166, to recover damages for the death of Cecil Burchell, by reason, as alleged, of the negligence of the defendants, in whose employment, as the fireman of a locomotive engine, he was at the time of his death.

The injury was the result of a collision caused, as the defendants admitted, by the negligence of their servants, and the claim was made and the assessment of the damages was based upon the

principle of the Workmen's Compensation for Injuries Act. The jury found that the estimated earnings of a person in the same grade as the deceased, in the like employment, in this Province, for the three years allowed by the statute, would be \$1,800, and they assessed the damages at that sum, apportioned between the father and the mother of the deceased at the sums of \$600 and \$1,200 respectively.

The deceased at the time of his death was twenty years of age and unmarried; he entered the service of the defendants about a month before his death; his parents lived in England.

The defendants appealed upon the ground that no pecuniary damages were proved, and in any event that the amount allowed was excessive and unwarranted by the evidence.

September 26. The appeal was heard by MOSS, C.J.O., GARROW and MACLAREN, J.J.A.

D. L. McCarthy, K.C., for the defendants. The liability of the defendants is not disputed, but it is submitted that the plaintiffs are entitled to nominal damages only, as the evidence shews that the deceased was not capable of earning money enough to support himself. He was not, therefore, a pecuniary asset to his parents, and, judging from his habits and disposition, it was unlikely that he would become so. The plaintiffs have also failed to shew that it was likely that the parents would require pecuniary assistance for many years to come. In these circumstances, the authorities shew that the plaintiffs' case must fail. They are collected in *McKeown v. Toronto R.W. Co.* (1909), 19 O.L.R. 361. Reference was also made to *Holleran v. Bagnell* (1880), 6 L.R.Ir. 333, cited in the *McKeown* case, at p. 367.

G. C. Gibbons, K.C., for the plaintiffs, argued that the verdict of the jury was reasonable, and should be upheld. Cases of this kind all depend upon their peculiar circumstances, and the jury had a right to assume in this case that the deceased would, in the course of a few years, be promoted to the position of engine-driver, and that he would be able to give his parents the assistance which he had promised, and which it was likely they would then require. The evidence as to the alleged intemperate habits of the deceased was of no value and should be disregarded. Reference was made to the following cases: *Thompson v. Trenton Electric and Water*

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Power Co. (1908), 11 O.W.R. 1009; *Moffitt v. Canadian Pacific R.W. Co.* (1909), 11 W.L.R. 608.

McCarthy, in reply, referred to *Franklin v. South Eastern R.W. Co.* (1858), 3 H. & N. 211; *Stephens v. Toronto R.W. Co.* (1905), 11 O.L.R. 19; *Atcheson v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 168.

November 12. Moss, C.J.O.:—The sole question for the jury was the amount of the damages which the plaintiffs were entitled to recover from the defendants by reason of the death of Cecil Burchell, who was accidentally killed while in the defendants' employ. The action was brought for the benefit of the deceased's father and mother under the provisions of the Fatal Accidents Act. The plaintiffs' right of recovery is, therefore, limited in amount to the pecuniary loss which it can be fairly and reasonably found the parents have suffered. And the inquiry is, or should be, first, whether, upon the evidence and under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, there was such a reasonable and well-founded expectation of pecuniary benefit as could be estimated in money so as to become the subject of damages, and secondly, whether, having regard to all these matters, the award of damages in this case was excessive and extravagant, and therefore unreasonable.

It is not necessary to go through the evidence at length. It is well summarised in the reasons for and against appeal, and, after a careful perusal of the whole case, and having regard to the course of decision, I do not think that upon the first question the case could have been withdrawn from the jury. There was evidence not entirely satisfactory, it may be, but yet evidence upon which a jury could reasonably find in the affirmative upon the first question. And the learned trial Judge could not properly have refused to submit it to the jury.

It then remained for the jury to ascertain and fix the value of the expectation of pecuniary benefit. But in exercising their functions in this respect the jury are not justified in going beyond what appears to be fair and reasonable, as against the defendants. It is not the province of juries nor are they privileged to be generous with other people's money. And it is the plain duty of the Court to see that an award of damages, in an action of this kind, which

appears to have been arrived at upon considerations not warranted by the evidence, shall not stand. In such a case the Court may and should interpose a controlling hand in order to prevent what appears to be an injustice.

In the present case it seems clear that the jury have not paid sufficient attention to the evidence or to the directions of the learned trial Judge, otherwise they could not reasonably have considered themselves warranted in placing the value they did upon the expectations of pecuniary benefit to the parents of the deceased from the continuance of his life.

We cannot, of course, force the plaintiffs to accept a sum named by us. All we can do is to send the case back for a new assessment of damages. And that must be the order unless the parties agree upon some amount.

GARROW, J.A. (after setting out the facts as above):—The learned counsel for the plaintiffs, with great earnestness, contended that the question was entirely one for the jury, and that the Courts of the Province had in recent years frequently unduly interfered with verdicts upon the ground that the damages awarded were excessive.

No one disputes that, when there is reasonable evidence of damages, it is for the jury to say how much, upon the evidence, such damages should be. But a jury must certainly regard the evidence, just as the Judge must regard the law. And, if either goes wrong, it is the duty of the appellate Court, in the administration of justice according to law, to see that, as far as possible, the wrong is corrected. That, as I understand it, is what appellate Courts are for. And we assert no new jurisdiction, as the books abundantly shew, when we say that we decline to regard the verdict of a jury, not reasonably and properly based upon the evidence, as any more sacred than the erroneous ruling of a Judge made in the hurry of a trial.

In actions of this kind the limits of what may and what may not be allowed as damages have been pretty well defined, although we are constantly being reminded that there is still unexplored territory, as, for instance, in the recent case of *McKeown v. Toronto R.W. Co.*, 19 O.L.R. 361, where many of the cases are referred to.

It is not by reason of the death alone, but because the death

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has disappointed the dependants' reasonable expectations of financial assistance, that damages are recoverable—a circumstance apt to be overlooked.

The cases shew that such expectations need not necessarily be based upon present conditions, but may, upon proper evidence, be founded in the future; as, for instance, in *Franklin v. South Eastern R.W. Co.*, 3 H. & N. 211, where it is said: "We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough, and such reasonable expectation may well exist, though from the father not being in need, the son had never done anything for him." See also *Rombough v. Balch* (1900), 27 A.R. 32, at p. 45.

The recovery must, from the nature of the case, be for substantial and not merely nominal damages: *Duckworth v. Johnson* (1859), 4 H. & N. 653. The burden of proof is, of course, upon the plaintiff, who must shew by reasonable evidence that the continuance of the life had either an immediate or a future value, financially, to him.

There can be no recovery for pain or suffering or other so-called sentimental damages, the basis being in every case purely financial loss, actual or expected.

The deceased young man had not been paying his parents, for whose benefit the action was brought, anything out of his wages. There is, therefore, no basis founded upon the past to go by. And the case is narrowed to a consideration of what, from all the circumstances, might reasonably be inferred as to the financial ability and the probable conduct of the deceased towards his parents in the future if he had lived.

The facts, briefly, appear to be as follows: The father, residing in England, is aged fifty-eight years, and the mother about four years younger. The father is a commercial traveller, earning about \$1,500 per annum, and in no present need of assistance, but he will be obliged, so he says, according to the rules of his employers, to retire at the age of sixty years. He has not been able to make savings. He has four other children, namely, three sons, all doing for themselves, and a daughter, at home. The sons, including Cecil, received a good and rather expensive education, and the father in his evidence says that there was an understanding with them, Cecil included, that they would assist their parents in their

old age, in consideration of the large sums which had been expended on their education. After leaving school, Cecil was in a wholesale warehouse in the city of Bristol for seven or eight months at a few shillings a week. He had had, before leaving England, a savings bank account for some years, and his savings were used towards paying the expenses of his passage to Canada, the balance having been supplied by the father. While he was in the warehouse in Bristol he paid his mother a percentage of his wages, twenty per cent., his father thinks. When Cecil left home he was about sixteen years of age. When he died he was not quite twenty-one. After coming to Canada, he sought and obtained employment as a farm servant, in which employment, with considerable intervals of idleness, he remained until he entered the service of the defendants about a month before his death. His wages as a fireman considerably exceeded what he earned as a farm servant, although the living expense would also be greater. And the employment would also have the further advantage of being continuous if the deceased proved to be capable and of steady habits. About the latter, however, there may be room for some doubt, because more than one witness called by the defendants spoke of him as inclined, while a farm servant, to unsteady, spendthrift habits, and his life upon the railway, during which no similar complaint appears to have been made, was unfortunately too brief to wipe out completely all memory of past delinquencies.

But it is, I believe, common knowledge that in recent years the railway companies have made temperance on the part of their employees a *sine quâ non*—a condition which must have operated beneficially in tending to correct the habits of the deceased, which, after all, seem not to have been deep-seated, or, perhaps, more than might be ascribed to a boy's exuberance, away from the restraining influences of home, with a little money in his pocket. He apparently kept up a correspondence with his mother, writing for the first two years about every second week, but latterly not so often. He is spoken of by the witnesses, or some of them, as likeable—I would think, of an ardent, generous, and affectionate nature, although no one expressly so states. The nearest to it is, perhaps, to be found in the evidence of Mrs. Phillips, with whom he had lived for many months, and to whom he was indebted for much kindness. She says, "she hated to see him go" when he left them to enter the defendants' employment.

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Upon the whole, while I regard the sum awarded by the jury as quite out of the question, I find myself, after much consideration, and not entirely without some doubt, unable to say, having regard to the decisions, that the case could properly have been withdrawn from the jury. There was, to begin with, the good terms on which he stood with his parents, and especially with his mother, with whom he corresponded, his improved prospects in his new employment, and the promise, which I have referred to, to make some recoupment, in consideration of the expense of his education; which, while not imposing a legal, might well have been regarded by a man of his disposition as creating a moral, obligation which he would have felt bound to implement, so far as he was able, when the time came, as it probably would upon his father's retirement. In the meantime the young man's earning capacity would, with experience, have increased, although, on the other hand, so would the imminence of the time at which he would probably have married, and thereby reduced, if not destroyed, his ability further to help his parents. These, however, were matters for the consideration of the jury, who, taking into account all the uncertainties and contingencies of the case, were to say how much, if anything, might reasonably, under all the circumstances of the case, have been expected by the parents from the bounty of their son, if the life had continued. But to put the amount at \$1,800, or three years' wages, the extreme sum recoverable under any circumstances under the Act, seems to be grossly excessive and unwarranted. Indeed, one would be inclined to think from the result that the jury totally misapprehended what they had to try, which was not the value of the life under the statute, but what, if any, pecuniary interest the parents had in the life, which at the best must have been a comparatively small sum.

In *Stephens v. Toronto R.W. Co.*, 11 O.L.R. 19, in a case which in its facts was stronger for the plaintiff, this Court reduced a verdict of \$2,100 to \$500, which was accepted rather than the alternative of a new trial. And in *Atcheson v. Grand Trunk R.W. Co.*, 1 O.L.R. 168, the jury, in the case of a brakesman, awarded only \$500, which was complained of as excessive, but upheld in this Court. For other instances in which the Court has interfered with the verdicts of juries in cases of this nature, see *Renwick v. Galt, etc., Street R.W. Co.* (1905), 11 O.L.R. 158, at p. 168; and

the list might easily be greatly extended, for the question is one constantly arising.

There should, therefore, in my opinion, be a new assessment unless the parties consent to a judgment for a smaller sum, which should not, I think, exceed the amount at which this Court arrived in the *Stephens* case. If such reduction is agreed upon, the appeal would, as in that case, be dismissed with costs, but, if not, the new trial would proceed, and the costs of the former trial be costs in the cause, and the costs of this appeal to the defendants in any event.

MACLAREN, J.A.:—I agree.

Order as stated by GARROW, J.A.

[IN THE COURT OF APPEAL.]

REX V. COOTE.

Liquor License Act—Conviction for Second Offence in Absence of Accused—Inquiry as to First Offence—Construction of sec. 101—Imperative or Directory—“And not before”—9 Edw. VII. ch. 82, sec. 20—Summary Convictions Act, sec. 2—Criminal Code, secs. 718, 722.

The defendant was charged with a second offence against the Ontario Liquor License Act, and was, in his absence, though duly summoned, convicted thereof before a magistrate, and sentenced to be imprisoned. Section 101 of the Act, as found in R.S.O. 1897, ch. 145, provides that in such a case the magistrate shall in the first instance inquire concerning the subsequent offence only, and, if the accused be found guilty thereof, he shall then, *and not before*, be asked whether he was so previously convicted; but, if he denies or does not answer, the magistrate shall then inquire concerning the previous conviction. The words “and not before” were struck out by the amending Act 9 Edw. VII. ch. 82, sec. 20. By sec. 718 of the Criminal Code, when the defendant has been duly summoned, if he fail to appear, the magistrate may proceed with the trial *ex parte* or may issue his warrant and adjourn the trial until the defendant is apprehended. Section 721 provides that, if the defendant is personally present, he shall be asked to plead. These sections are made applicable to offences against Ontario statutes by the Summary Convictions Act, R.S.O. 1897, ch. 90, sec. 2, unless in any Act “hereafter passed it is otherwise declared:”—

Held, reversing the order of MIDDLETON, J., discharging the defendant upon *habeas corpus*, that the magistrate had jurisdiction to convict the defendant in his absence; the two provisions were neither repugnant nor inconsistent, and should be read together.

Per MEREDITH, J.A., that, since the amendment striking out the words “and not before,” the provision of sec. 101, as to asking the defendant whether he was previously convicted, must be regarded as directory only.

Per MAGEE, J.A., that the provision is peremptory; but (with some doubt) the section may be construed, in connection with other sections, so as to authorise proceeding in the defendant’s absence, if he chooses to absent himself altogether.

History of the legislation and review of the authorities.

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MOTION to discharge the defendant from custody, upon the return to a *habeas corpus* and *certiorari* in aid.

September 9. The motion was heard by MIDDLETON, J., in Chambers.

J. Haverson, K.C., for the defendant.

E. Bayly, K.C., for the Crown.

September 10. MIDDLETON, J.:—The only question argued was the power of the magistrate to proceed with the trial of the defendant, who was charged with an offence against the Liquor License Act as a second offence, in his absence.

The Criminal Code provides (sec. 718) that, when the defendant has been duly summoned, if he fail to appear, the magistrate may either proceed with the trial *ex parte* or may issue his warrant and adjourn the trial until the defendant is apprehended.

Section 721 provides that, if the defendant is personally present, he shall be asked to plead.

These sections are made applicable to offences against Ontario statutes, by R.S.O. 1897, ch. 90, sec. 2 (now 10 Edw. VII. ch. 37, sec. 4), “unless . . . otherwise declared.” These words add nothing to the general rule which makes all general provisions subject to the requirements of any particular Act.

The Liquor License Act, in dealing with cases where previous convictions for an offence against that Act is charged, provides (sec. 101) that the magistrate shall first inquire into the subsequent offence, and, upon finding the defendant guilty, the defendant shall be asked whether he was previously convicted as alleged, and, if an affirmative answer is given, he may be convicted accordingly; if not admitted, the magistrate is then to try the questions concerning the previous conviction.

It is contended that the provisions of this section are imperative, and not merely directory, and shew that the trial for a second offence cannot proceed unless the defendant is actually present, either in obedience to a summons or by virtue of a warrant.

That the provisions of the section requiring the trial of the subsequent offence to precede the inquiry as to the former conviction are imperative and not directory, has been determined in *Rex v. Nurse* (1904), 7 O.L.R. 418, which overrules an earlier case of

Regina v. Brown (1888), 16 O.R. 41, in which Armour, C.J., had held the provisions to be directory only.

This case accepts the reasoning of the Court in Nova Scotia in *The Queen v. Salter* (1887), 20 N.S.R. 206, which determined that the provisions of the clause relating to the asking of the accused whether he admitted or denied the previous conviction were imperative.

I can see no ground for distinguishing between the different provisions of this section, and holding some to be imperative and the others directory, and, even if I am not technically bound by the decisions, I have no hesitation in accepting them.

The Nova Scotia case is upon the precise question now before me, and determines that the magistrate has no power to convict of a second offence without bringing the defendant before him, so that the course pointed out by the section in question can be strictly followed.

The view of the majority of the Court in *Ex p. Groves* (1883), 23 N.B.R. 38, and (1884), 24 N.B.R. 57, does not commend itself to me. I cannot see why the bringing of the accused before the magistrate on a warrant before proceeding with the trial should be regarded as a "defeating of the ends of justice" or as practically preventing the making of a conviction for a second offence.

On the other hand, to read into sec. 101 of the Liquor License Act the words found in sec. 721 of the Criminal Code, "if the defendant is personally present at the hearing," would be legislation rather than interpretation.

There does not seem to be any good reason for the requirements of sec. 101, but this is a matter for the Legislature, and not for the Courts.

With regret, as there seems no doubt of the defendant's guilt, his discharge must be ordered.

No costs.

The Crown appealed to the Court of Appeal from the order of MIDDLETON, J.

September 22. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. R. Cartwright, K.C., for the Crown. The magistrate properly

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convicted the defendant of a second offence under the Ontario Liquor License Act, R.S.O. 1897, ch. 245, although the conviction took place in the absence of the defendant. It is contended on behalf of the defendant that, under the provisions of sec. 101 of the Act, he must be present. But sec. 718 of the Criminal Code gives the magistrate power in a case such as this to hear and determine the matter in the absence of the accused. The magistrate need only inquire of the defendant concerning previous convictions if the defendant is present at the hearing; if he be not present, a previous conviction may be proved otherwise. The defendant cannot block the wheels of justice by staying away: *Rex v. Warilow* (1908), 17 O.L.R. 643, 664; *Regina v. Kennedy* (1889), 17 O.R. 159. The provisions of sec. 101 of the Liquor License Act are directory, and not peremptory or imperative: *Regina v. Brown*, 16 O.R. 41; *Rex v. Graves* (1910), 21 O.L.R. 329, at pp. 346 and 347. The case of *Rex v. Nurse*, 7 O.L.R. 418, does not apply here, because the magistrate in that case had improperly admitted evidence of a prior conviction before the defendant's guilt upon the charge against him of a third offence had appeared. In that case the provisions of sec. 101 were said to be imperative, but at that time the words "and not before," which were deleted by the amendment of 9 Edw. VII. ch. 82, sec. 20, were in the section. As to the decision in that case, the words of the Earl of Halsbury, L.C., in *Quinn v. Leathem*, [1901] A.C. 495, at p. 506, where he said that a case is only an authority for what it actually decides, are applicable. See also *Regina v. Wallace* (1883), 4 O.R. 127.

J. Haverson, K.C., for the defendant. The magistrate could not properly convict the defendant, in his absence, of a second offence under the Liquor License Act. Section 101, sub-sec. 1, of that Act presupposes his presence. It is a necessary implication, from the requirement that he shall be asked whether he was previously convicted, that he be present to be so asked. Section 718 of the Criminal Code cannot be invoked, because sec. 2 of the Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, provides that the procedure before a Police Magistrate is to be the same as under Dominion Acts respecting procedure in summary convictions, "unless in any Act hereafter passed imposing the penalty or punishment it is otherwise declared." In sec. 101 of the Liquor License Act it is otherwise declared. Special enactments are

construed to control general ones, and sec. 718 of the Criminal Code applies only where there is no other provision in the Ontario statutes. The Liquor License Act adopted the Dominion procedure only so far as consistent with itself, and the provision of the Summary Convictions Act was qualified by the words "unless in any Act hereafter passed imposing the penalty or punishment it is otherwise declared." The words in sec. 101 of the Liquor License Act are peremptory and imperative, not merely directory, notwithstanding the amendment of 1909 deleting the words "and not before:" *The Queen v. Salter*, 20 N.S.R. 206; *The Queen v. Porter* (1888), 20 N.S.R. 352. In *Regina v. Brown*, 16 O.R. 41, Armour, C.J., says at p. 48, "No provision is made for the case of the trial proceeding in the absence of the defendant."

Cartwright, in reply. There is no conflict between sec. 101 of the Liquor License Act and sec. 718 of the Criminal Code. The Code provides for a case of absence; the Liquor Act does not.

November 12. MACLAREN, J.A.:—The proceedings in question on this appeal took place under R.S.O. 1897, ch. 90, sec. 2, as the new statute, 10 Edw. VII. ch. 37, had not come into force at the time of the trial.

This section provides that "Where a penalty or punishment is imposed under the authority of any statute of the Province of Ontario . . . and is recoverable before . . . a Justice of the Peace . . . the like proceedings, and no other, shall and may be had for . . . hearing the complaint, and for the conduct of the Court . . . as, under the statutes of the Dominion of Canada then in force, might be had and should be performed, if the penalty or punishment had been imposed by a statute of Canada unless in any Act hereafter passed imposing the penalty or punishment, it is otherwise declared."

The Dominion statute in force was sec. 718 of the Criminal Code, which provides that where, as here, the accused does not appear at the time appointed by the summons the "Justice may proceed *ex parte* to hear and determine the case in the absence of the defendant, as fully and effectually, to all intents and purposes, as if the defendant had personally appeared," or, if he thinks fit, may issue his warrant and adjourn the hearing.

In this case the defendant was accused of a second offence

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against the Liquor License Act. Section 101 of that Act provides that in such a case the Justice shall in the first instance inquire concerning the subsequent offence only, and, if the accused be found guilty thereof, he shall then be asked whether he was so previously convicted; but if he denies that he was so previously convicted, or stands mute of malice, or does not answer directly to such question, the Justice shall then inquire concerning the previous conviction or convictions.

In my opinion, the two statutes should be read together, and I think effect can be given to both. The second on its face provides only for the case where the accused is present; the Criminal Code expressly provides that, if the accused is not present after being duly summoned, the Justice may proceed with the case as fully and effectually to all intents and purposes as if the defendant had personally appeared, or, if he thinks fit, he may issue his warrant and bring the accused before him. In this case the magistrate exercised the discretion which the statute gave him, and I do not think we have any right to review his action.

The provincial Act provides that the Dominion statute is to apply unless in any Act hereafter passed it is otherwise declared. Here we are not dealing with an Act "hereafter passed," nor is it "otherwise declared," so we have neither of the conditions required by the Act.

The case of *Rex v. Nurse*, 7 O.L.R. 418, relied on, is, in my opinion, not in point. There the conviction was quashed because the magistrate took evidence as to previous convictions before deciding whether the subsequent offence was proved or not, and there was then in the section a clause prohibiting such a course, as it stated that it was only after the accused had been found guilty of the subsequent offence, "and not before," that the inquiry as to previous convictions should be entered upon. The words "and not before" have since that decision been struck out by the Legislature. The same remark applies to the Nova Scotia case relied upon, *The Queen v. Salter*, 20 N.S.R. 206. In both these cases the magistrates adopted a course expressly prohibited by the statutes there construed; in the statutes applicable to this case there is no such prohibition, and, in my opinion, the procedure is quite in harmony with them.

Further, if one looks at the object of the provision in question,

this view is very much strengthened. Its object may be said to be two-fold: first, to provide against the premature admission of evidence that would be illegal at that stage and would be certain to prejudice the accused; second, to ask the accused at the proper stage to plead to this second charge, and, if he confessed, to obviate the necessity of producing evidence to support it. The plan adopted in this case is not, in my opinion, open to any objection, and is quite in harmony with both the letter and the spirit of the law.

I would allow the appeal.

MEREDITH, J.A.:—It is very easy to say that the special provisions of one enactment shall prevail against the mere general provisions of another enactment; just as it is easy to say two and two make four—though in truth they may sometimes make twenty-two; and the one proposition may be just as helpful as the other in the consideration of such a case as this. We must first find one provision in conflict with another, and we must then find which is special and which is general—if the terms really apply at all—and not take all these things for granted: and it must always be remembered that there is another, and more important, rule of construction, aimed at the prevention, not the creation, of needless conflict between different enactments or different parts of the same enactment; a rule which, I can but think, if rightly applied here, leaves no room for the introduction of any other rule.

The Liquor License Act does not say that a charge of a second offence shall not be tried in the absence of the accused; if it did, it would be extraordinary and unaccountable legislation. How can you account for it; what reason can be suggested for making that offence the one exception in the great variety of offences, and the great number of them, more and less serious than the offence in question, all of which may be tried summarily in the absence of the accused? If that were the intention of the Legislature, it ought to have been, and I am sure it would have been, expressed. To act as if it had been is legislation rather than adjudication, and is not complimentary to the ability of the Legislature to say that which it means. Why create a conflict where none need be? It is better to regard the cardinal rule and give to each such a reasonable construction that there may be no conflict; and not only is it better

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but it is obligatory; and very easy. The provisions of the Liquor License Act are applicable, and should be applied, in form and substance, when the accused is present, as he always may be if he so chooses; it cannot in form, but can in substance, be applied when he is not present—the whole purpose of it can be given the full like effect in either case—and so in form is inapplicable in his absence. The magistrate has clearly-expressed power to proceed in his absence, under certain circumstances, as well as in his presence; we should not think and act as if there were no such power.

Then let us look at the reason of the thing, let us have some regard for the purpose of the provision in the Liquor License Act, and not blind ourselves to everything but an effort to give a literal meaning, of mathematical certainty, to each word employed. The purpose of this legislation is solely to save the accused from the prejudice to his case which might be created by evidence or admission of a former conviction. The substantive charge is a violation of some of the provisions of the Act, a charge upon the trial of which evidence of other offences would be inadmissible, and the accused is not to be put in a worse position in that respect because of the charge of a previous conviction or previous convictions; and that purpose should and would be given effect to quite as effectually in *ex parte* proceedings as in the presence of the accused; in *ex parte* proceedings the magistrate is empowered to hear and determine the case as fully and effectually, to all intents and purposes, as if the accused were personally present. If personally present, no evidence or admission of the former conviction would be admissible until guilt of the subsequent offence was proved and found; if absent, the like course of procedure in regard to the admission of such evidence would be applicable and should be applied, and of course a plea of guilty, or an admission of a former conviction, would be impossible—the trial would proceed as if there had been a plea of not guilty as to the substantive offence, and as to the former conviction, each at the proper time.

Thus, reasonably, I hope and think, effect can, and should, be given to each enactment, and therefore I can find no reason for acting as if they were inconsistent the one with the other, and less for creating repugnancy.

No one would deprecate more than I, reading into either enactment any words which would change its meaning, even for a good

and useful purpose; but I would the more deprecate reading into the enactment in question such words as "and no person shall be proceeded against in his absence" (as must be done to make any expressed conflict) and at the same time protesting against reading into it such words as "if present," though not necessary as the enactment stands; but would, most of all, deprecate reading out of the statutes the whole of the provisions respecting proceeding *ex parte*, in the teeth of the legislative injunction that such procedure "and no other" shall be employed; and without any sort of substantial reasonable purpose in doing so, but with the effect of shortening the arm of justice so that any such offender might stand beyond its reach and laugh at its impotence.

It is said that the cases are opposed to this view of the matter; but upon consideration of them it will be found that that is not so, that the very opposite is the fact. In *Regina v. Edgar* (1887), 15 O.L.R. 142, in *Regina v. Brown*, 16 O.L.R. 41, and in *Rex v. Nurse*, 7 O.L.R. 418, the accused was present at the trial, and yet there was a conflict of opinion as to the imperative need of complying with the provisions of the Liquor License Act. These cases throw no light on the question involved in this case. On the other hand, *Regina v. Kennedy*, 17 O.R. 159, is one in which a Divisional Court sustained a conviction of a third offence in the absence of the accused and without compliance with the provisions of the Liquor License Act: and in a quite recent case—*Warilow's*, 17 O.L.R. 643, 664—the very question arose, and, after a full discussion of it, and of the cases bearing upon it, a Divisional Court unanimously adjudged that a conviction made in the absence of the accused, and without any of the formalities provided for in the Liquor License Act, was valid; that the accused might be proceeded against in his absence. The attention of Middleton, J., could not have been called to this case; the result before him must have been different if it had.

The Nova Scotia case, so often referred to, is not a decision to the contrary. It was decided under very different legislation; in which there were no such imperative words as I have quoted from the Ontario Summary Convictions Act; on the contrary, it was provided that the summary convictions enactment might be proceeded under "so far as no provision is hereby made for any matter or thing which may be required to be done in regard to such prose-

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cution;" so that one might, without inconsistency, agree with the Nova Scotian Court, and hold that the judgment in appeal should be reversed; and, if this were not so, the decision of the New Brunswick case, or rather the opinions of the Judges expressed therein, would off-set the Nova Scotian decision.

But, let it be assumed that the two enactments are ever so repugnant the one to the other: which is to prevail? That question is answered, in unmistakable language, by the Legislature, in the Ontario Summary Convictions Act, an Act especially passed for the purpose of governing the mode of procedure in such cases as this, and all others, in summary proceedings under the statutes of the Province; and there it is enacted that the procedure therein provided "and no other" shall be taken, unless, in any Act thereafter passed imposing the penalty or punishment, "it is otherwise declared." The two enactments are contained in the same statute-book and were passed at the same time. How can it, in the face of such language, be held that the provisions of that enactment should give way to those of the Liquor License Act? The latter could be saved only if it were (1) a subsequent enactment, and (2) if it were "declared" in it that the provisions of the Ontario Summary Convictions Act should not apply; and, plainly it seems to me, neither of these requirements exists. So that, if one or other of the provisions must go to the wall altogether, the Legislature has peremptorily said that, in regard to procedure, it must be the Liquor License Act; but, as I have before said, there is, in my opinion, no occasion for destroying one or the other; both can very well exist together.

Upon yet another ground the learned Judge, in my opinion, erred in interfering with the conviction. Whatever might have been thought of the provisions of the Liquor License Act now in question before the recent amendment of them, I cannot but think they must now be deemed to be but directory. Before that amendment there was a marked conflict of opinion upon the question; the weight of judicial opinion being probably against its imperative character; that must have been the opinion of the Queen's Bench Division which decided *Wallace's* case, 4 O.R. 127, for otherwise the conviction must have been quashed; and it was also, no doubt, the view of the dissenting Judge, for, if not, his opinion that the conviction should be quashed would have been based upon that ground

also; again in *Brown's* case, 16 O.R. 41, Armour, C.J., expressed the opinion that the enactments in question were directory only, Street, J., concurring. The Judges comprising the Court which considered *Wallace's* case were more than ordinarily qualified to deal with such a question; against that there was the unanimous judgment of a Chancery Divisional Court in *Nurse's* case, 7 O.L.R. 418, following *Edgar's* case, 15 O.L.R. 142, a judgment of a single Judge—the late Mr. Justice Rose. In *Nurse's* case the *Wallace* case was not referred to, and so the Court fell into the error of saying that *Brown's* case was the only one in which any opinion that the enactment was directory only had been expressed. I need not again refer to the Nova Scotia and New Brunswick cases.

It is not needful to say upon which side in that conflict one would have stood; but I may say that, in my opinion, more attention might well have been given, in some of them, to the purposes of the legislation.

Before the recent enactment the provision was that the magistrate should “in the first instance” inquire concerning the subsequent offence only, and, if the accused were found guilty of it, he should “then, and not before,” proceed in regard to previous convictions. The negative words “and not before” had been, of course, much relied upon as indicating the imperative character of the enactment; by that recent legislation—9 Edw. VII. ch. 82, sec. 20—those words “and not before” were struck out; the words of the section are: “The paragraph numbered 1 in section 101 of the Liquor License Act is amended by striking out the words ‘and not before’ in the third line.”

No one can doubt that the one purpose of this enactment was to settle the vexed question in favour of the directory character of the enactment. What other reasonable purpose can be suggested? Is there then any good reason why effect should not be given to such intention? Having regard again to the purposes of sec. 101, I have no difficulty in answering the question in the negative.

Two cases have been decided since the amendment of the Act, in each of which this question was involved. In *Rex v. Teasdale* (1910), 20 O.L.R. 382, the amendment of the Act does not seem to have been brought to the attention of the Court. In *Rex v. Graves*, 21 O.L.R. 329, although it eventually was decided upon another ground, this question was fully considered by Riddell, J.,

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whose conclusion was, that, since the amendment at all events, the enactment must be considered directory only. I agree with him in his conclusion and in the reasoning by which it was reached.

I would, therefore, allow the appeal.

Magee, J.A.

MAGEE, J.A.:—Ever since the Consolidated Statutes of Canada 1859, ch. 103 (based on 16 Vict. ch. 178), there has been a provision in the law relating to summary convictions generally, that if at the day and place appointed for hearing a complaint, the defendant did not appear, and it was proved that the summons had been duly served, the Justice or Justices of the Peace might proceed to hear and determine the case in his absence, or might issue a warrant to secure his presence and adjourn the hearing until his apprehension (sec. 32), and that “in case the defendant be present at the hearing, the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to shew why he should not be convicted” (sec. 37), and, if he thereupon admitted the truth, and shewed no cause or no sufficient cause, the Justice or Justices should convict him (sec. 38), and, if he did not admit the truth of the information or complaint, the Justice or Justices should proceed to hear the evidence (sec. 39), and determine the matter (sec. 41).

This provision for *ex parte* hearing, if the defendant disobeyed the summons, applied to all cases of summary convictions; and it would be applicable whether the defendant was charged with a first or a second offence. After Confederation it was embodied also in subsequent Dominion consolidating Acts (32 & 33 Vict. ch. 31, secs. 7 and 32, R.S.C. 1886, ch. 178, sec. 39, Criminal Code, 1892, sec. 853), and is now in the Criminal Code of 1906, of which secs. 718, 721, 726, correspond in substance with those of 1859 which I have referred to.

In cases where a previous conviction was charged there was not in these Acts relating to summary convictions any such provision as there was in the case of indictable offences triable by a jury (Criminal Code, 1906, sec. 963), for postponing any allusion to the previous offence until after the jury had found the accused guilty of the subsequent one. That order of procedure, adopted in fairness to the accused so that the jury might not be prejudiced against him by an idea of his former guilt, has little such advantage when he is to be tried by a magistrate, who knows of the alleged earlier

shortcomings from the sworn information, and may himself have made the conviction.

In December, 1874, the Ontario Legislature passed the statute 38 Vict. ch. 4, by sec. 3 of which it was provided that "where a penalty or punishment is imposed under the authority of any statute of . . . Ontario . . . and is recoverable before, or may be inflicted by, a Justice, or Justices of the Peace, or a Police or Stipendiary Magistrate, the like proceedings, and no other, shall and may be had for the recovery of the penalty, and the infliction of the punishment, and otherwise in respect thereof; and the convicting Justice, Justices or Police or Stipendiary Magistrate shall perform the like duties in respect thereto . . . as, under the statutes of the Dominion then in force, might be had and should be performed, if such penalty or punishment had been imposed by a statute of Canada." There is added a qualification in these words: "Unless in any Act hereafter passed imposing such penalty or punishment, it be otherwise declared." If there were no such other Act, this qualification at least emphasised the intention that the Dominion procedure should fully apply and that the Legislature might make exceptions.

In 1877, by 40 Vict. ch. 7, sch. A (109), there were added after the words "the recovery of the penalty" these words, "compelling the attendance of the parties or witnesses, the hearing of the complaint, the conduct of the Court, the taking and estreating of recognizances;" so that, at least, it was being made plain that the attendance of the parties might be compelled. As so amended, the 3rd section of the Act of December, 1874, qualification clause and all, now forms sec. 2 of the Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, which was amended by 1 Edw. VII. ch. 13, sec. 1, and not superseded by 10 Edw. VII. ch. 37, until the 1st September, 1910, after the conviction here in question.

In April, 1874, the Ontario Liquor License Act, 37 Vict. ch. 32, had been passed, and by sec. 44 had made applicable thereto the procedure under Consolidated Statutes of Canada 1859, ch. 103, already mentioned. Thus, although heavier punishments for second and third offences were thereby prescribed, there was no special procedure where such a subsequent offence was charged, and the defendant could be convicted in his absence if he disobeyed the summons.

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Then in 1877, by 40 Vict. ch. 18, amending the Liquor License Act, sec. 44 was repealed by sec. 20, which directed that prosecutions should take place in a summary manner according to the provisions and after the forms in the Dominion Act (of 1869, 32 & 33 Vict. ch. 31) relating to summary convictions, and already referred to, which should be held to apply to all prosecutions and proceedings "so far as consistent with this Act." This sec. 20 was retained on the revision of the statutes in 1877 (R.S.O. 1877, ch. 181, sec. 68), but was omitted from R.S.O. 1887, ch. 194, sec. 96, being doubtless considered unnecessary in view of the general enactments adopting Dominion procedure as already mentioned, 38 Vict. ch. 4 and its amendment. But in the same Act, 40 Vict. ch. 18, the Legislature, with a view, no doubt, of preventing prejudice as much as possible in the mind of the magistrate in liquor cases, against the accused, amended the Liquor License Act of 1874, by sec. 16, which introduced into that Act a new section, 35a, requiring special procedure in cases where a previous conviction was charged. The words are: "35a. The proceedings upon any information for committing any offence against any of the provisions of this Act, in case of a previous conviction or convictions being charged, shall be as follows: (1) The Justices or Police Magistrate shall in the first instance inquire concerning such subsequent offence only, and if the accused be found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the information, and if he answers that he was so previously convicted, he may be sentenced accordingly; but if he denies that he was so previously convicted, or stands mute of malice, or does not answer directly to such question the Justices or Police Magistrate shall then inquire concerning such previous conviction or convictions." That provision became sec. 101 of the present Liquor License Act, R.S.O. 1897, ch. 194, which has been amended by 9 Edw. VII. ch. 82, sec. 20, to which I will allude. It was in that same session of 1877 in which this special procedure was prescribed for liquor cases, that the provincial Legislature also adopted the amendment (40 Vict. ch. 7, sch. B. 109), already referred to, of the Ontario Summary Convictions Act (38 Vict. ch. 4, sec. 3), making clear the right to compel the attendance of the defendant in all summary conviction cases. Thus, although the Legislature had before it twice in that session the adoption of Dominion procedure, and was specially

referring to the compulsory attendance, this special provision was made in these liquor cases that the defendant is to be asked as to his previous guilt.

One may suppose that the only object of this was to simplify the proceedings and obviate the necessity of giving proof if the fact was admitted, but it would not be going too far to suppose that in this exceptional provision for liquor cases, in which the accused was liable to imprisonment if it were a second offence, but not if it were a first offence, the Legislature may have intended to make sure, as ordinarily upon indictments, that he would be present when his liability to imprisonment was being established. The means of compelling his attendance were at hand, and until he was apprehended his imprisonment could not take place. And, if it be said that by absenting himself he could defeat the enforcement of the statute, it may be answered that so can the accused in much more serious offences. Whatever may have been the object of the enactment, we have not a right merely to guess, but must take it as we find it, and put on it that construction to which it reasonably leads, even though it may be an unwise or unnecessary provision or may tend to defeat the very object of the Act. So reading it, we find that the Dominion section, which says that if present he shall be asked as to the whole offence, is put aside and a special requirement substituted. A reasonable, if not necessary, implication from the requirement that he shall be asked, is that he must be present. This is accentuated if we look at the minuteness of the provision for failure to admit the former conviction. "If he denies" or "stands mute of malice" or "does not answer directly" "the Justices or Police Magistrate shall then inquire." All these contingencies before the inquiry are themselves consistent only with his presence.

Apart from the ordinary rule as to special enactments being construed to control general ones, there is the fact that the Liquor License Act only adopted the Dominion procedure "so far as consistent" with itself, and the summary conviction provision, 38 Vict. ch. 4, was qualified by the words "unless in any Act hereafter passed imposing the penalty or punishment it is otherwise declared," and here we have this clause so subsequently passed in 40 Vict. and as part of the Liquor License Act. If this question had arisen on the 30th December, 1877, it appears to me clear that

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full effect must have been given to the new provision if it clashed with the general law.

In the following year, 1878, the Canada Temperance Act, 41 Vict. ch. 16, was passed by the Dominion Parliament, and a section (sec. 122, afterwards R.S.C. 1886, ch. 106, sec. 115, now R.S.C. 1906, ch. 152, sec. 143) was inserted in it, practically in the same words as the new sec. 35a of the Ontario License Act. That Canada Temperance Act, in another section, sec. 107, now R.S.C. 1906, ch. 152, sec. 135, declared that offences against it might be prosecuted in the manner directed by the Act respecting summary convictions "so far as no provision is hereby made for any matter or thing which may be required to be done with respect to such prosecution," and all the provisions in that other Act should be applicable as if therein incorporated. I see no practical difference, therefore, between the two enactments—provincial and Dominion—as to the extent to which the special provision shall take effect.

In each case we find the provision in the general law that the defendant, if present, shall have the charge stated to him and be asked as to it, and then in the special Act the direction that this shall not be done as to the previous offence, but that, at a subsequent stage, a proceeding is to be taken for which his presence is necessary. In the one case there are the express words, "in case the defendant be present," shewing that the possibility of his absence was contemplated. In the other case those words are omitted, and the inquiry as to the previous offence is predicated on his being asked as to it and his denial or standing mute or refusing to answer, and not on his possible absence or mere failure to answer.

As regards the Liquor License Act, the revision of the statutes taking effect on the 31st December, 1877, made the Summary Convictions Act and the Liquor License Act contemporaneous, and would destroy any argument to be drawn from the words "hereafter passed" used in 38 Vict. ch. 4, sec. 3; and the omission of sec. 20 of 40 Vict. ch. 18 from the Revised Statutes of 1887, took out also the words therein "so far as consistent with this Act," and any argument to be drawn from them. But both the Revised Statutes of 1877 and 1887 were expressly declared not to be held to operate as new laws, and, whatever may be the legal result of these changes, I cannot think there was any intention to change the law as to the defendant's presence in these cases, or it would have

been more directly done. So the statutes remained until 1909, when, by 9 Edw. VII. ch. 82, sec. 20, the words "and not before" were struck out of sec. 10 of the Liquor License Act, and it is said that this had the effect of doing away with any necessity for the defendant's presence. The very fact of the change would go far to shew that his presence was previously considered necessary. But the question arises, has the change that effect? If it were so intended, the Legislature could very easily have made it plain by inserting the words "if present," and providing for his failure to answer, and not merely for his refusal to do so. But it seems to me that the only effect is to declare that, whereas formerly the defendant could not, before being found guilty, be asked as to the previous conviction, and it would have been improper so to ask him, it is now made necessary to ask him at the later stage, although he may inadvertently or otherwise have been asked before. The same provisions are retained as to first inquiring as to the subsequent offence only and as to proceeding after denial or refusal to answer directly or standing mute of malice, and his presence seems none the less necessary than before.

There has been in some of the cases discussion as to whether the section was peremptory or directory merely. An enactment may be peremptory in part only. It may be that this change was intended to make the statute less peremptory as to the order of the two inquiries, although I cannot think that to have been intended. If not in that respect, I fail to see how it can operate to lessen the peremptory character as regards the presence of the defendant. If that were intended, surely other more direct expression would have been made. If the law then required the presence of the accused, it does not appear to me that any change in that respect has taken place.

Several cases have come before the Courts under the Canada Temperance Act. In 1883 it was held by a majority of the Supreme Court of New Brunswick in *Ex p. Groves*, 23 N.B.R. 38, that it was sufficient that the defendant was present by his counsel; and so again in *Ex p. Grieves* (1890), 29 N.B.R. 543. In 1884, in *Ex p. Groves* and *Ex p. McDonald*, 24 N.B.R. 57, the majority held, "not without considerable doubt," that a conviction of Groves, without the presence of either defendant or any counsel for him, was valid, and that McDonald having once attended, though

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absent at the subsequent sitting, should be considered as if present and standing mute of malice.

In 1887 the Supreme Court of Nova Scotia in *The Queen v. Salter*, 20 N.S.R. 206, held that the conviction in the defendant's absence was invalid. This was followed in *The Queen v. Porter*, 20 N.S.R. 352 (1888). In *The King v. O'Hearon* (1901), 5 Can. Crim. Cas. 187, the same Court held that the case was different where the defendant was represented by counsel, and it was sufficient to ask counsel, therein agreeing with the New Brunswick Court. In *The King v. Bigelow* (1904), 8 Can. Crim. Cas. 132, a case under the Nova Scotia License Act, the defendant's counsel was asked, in the defendant's absence, as to the previous convictions, and the Court said, if it was urged that the magistrate had not asked the defendant personally—"a necessary thing to do, as held by this Court in a former case"—that "the statute has since been changed, and it is only necessary to do so now when he is present in person, which he was not."

In *Regina v. Wallace*, 4 O.R. 127, the defendant had appeared and made default at the adjourned sitting. The case went off on other grounds, and the question is not dealt with except by Armour, J., who said it did not appear that the defendant was not asked, and he added that the omission to ask him would not deprive the magistrate of jurisdiction to prove the previous conviction without asking him at all. In *Regina v. Edgar*, 15 O.R. 142, Rose, J., held that the special provision was so far peremptory that the previous offence could not be inquired into until after the magistrate had not only heard evidence of the later offence but also found the defendant guilty. In *Regina v. Clark* (1888), 15 O.R. 49, Rose, J., quashed the conviction upon other grounds, but overruled the objection that it was made in the defendant's absence, and, as in his absence he could not be asked to plead, did not see why the magistrate could not proceed without plea; otherwise the defendant's absence would in every case prevent conviction. I have already referred to that argument. In *Regina v. Brown*, 16 O.R. 41, the objection to the conviction was that there was no proof as to former offence. Armour, C.J., Street, J., concurring, held that the sufficiency of the proof was for the magistrate, but in delivering judgment the learned Chief Justice said he might add that it seemed to him that sec. 115 of the Canada Temperance Act (R.S.C. 1886, ch. 106) was directory only, and that there was no such reason for the procedure as exists in

the case of an indictment—"and no provision is made for the case of the trial proceeding in the absence of the defendant." I confess I would not have thought the reasons suggested would lead to the conclusion stated, but it was not necessary to the decision of the case. In *Regina v. Kennedy*, 17 O.R. 159, the defendant and his counsel had attended during the inquiry as to the first offence, but not at the adjourned sitting; the Common Pleas Division—Rose, J., delivering the judgment—refused to quash the conviction, considering that all doubt as to the right to proceed in the defendant's absence was set at rest by the Summary Convictions Act, R.S.C. 1886, ch. 178, secs. 47 to 52; and, following *Regina v. Mabee* (1889), 17 O.R. 194, which, however, was not a case of a second offence, held that, where the defendant has once had an opportunity to defend and does not, he cannot defeat the administration of justice by refusing to appear. The wording of the particular enactment as to second offences is not specially referred to in the judgment. The result in that case would be in accord with the decisions of the Nova Scotia and New Brunswick Courts.

In *Rex v. Nurse*, 7 O.L.R. 418, a case under the Liquor License Act, the Divisional Court held, as in *Regina v. Edgar*, that inquiring into the previous offence before finding guilty of the subsequent one was fatal to the conviction. The Chancellor, in delivering the judgment of the Court and referring to the case of *Regina v. Edgar*, in which it was held by Mr. Justice Rose that the directions of the statute were imperative, said: "The only case which has expressions contrary to *Regina v. Edgar* is *Regina v. Brown*, 16 O.R. 41, 48, in which Armour, C.J., expresses his opinion that sec. 115 of the Canada Temperance Act is only directory; but that is not the decision of the Court, and it does not overrule *Regina v. Edgar*. It may be difficult, perhaps, to give a good reason for the enactment . . . yet the enactment is so distinctly and emphatically framed that it cannot be evaded under the guise of no harm arising from disregarding its precise terms;" and, after referring to the opposite decisions in New Brunswick and Nova Scotia, said: "The general rule is that enactments regulating the procedure of the Courts are imperative and not directory merely."

In *Rex v. Warilow*, 17 O.L.R. 643, 664, a case under the Liquor License Act, the defendant had been present with his counsel, but only counsel attended on the adjournment when the previous

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offence was gone into. Riddell, J., relying upon sec. 722 (2) of the Criminal Code, 1906, as to proceeding in the defendant's absence when he does not attend after adjournment, held the conviction valid. He thought the Ontario and New Brunswick cases should be followed, agreeing as they did with a Quebec case (which, however, was a case of assault and not of a second offence) rather than the Nova Scotia cases of *The Queen v. Salter* and *The Queen v. Porter*, if the two latter were in reality adverse to the validity of the proceedings. But he did not consider them to be so, based as they were upon the qualification in the Canada Temperance Act directing prosecutions to be in the manner provided by the Summary Convictions Act "so far as no provision is hereby made." I do not gather from his judgment that he disapproves of the Nova Scotia decisions in cases under the Canada Temperance Act, when, as in the present case, the defendant has not at any time appeared in person or by counsel.

In *Rex v. Graves*, 21 O.L.R. 329, a case under the Liquor License Act, the objection was made that the magistrate should not have taken evidence as to the former conviction until he had asked the defendant as to it. Riddell, J., after referring to *Regina v. Edgar*, *Rex v. Nurse*, and *Regina v. Brown*, and the amendment of 1909 striking out the words "and not before," said (p. 347): "Some end must have been aimed at and some result must have been intended to be effected by this amendment; and it seems to me that the only object there could be was to make the provision directory, instead of imperative and peremptory. It is not necessary to consider how the case would have stood had the language been originally as it now stands; and to point out that the words 'and not before' are not to be found in the latter part of the sub-section" of the Liquor Act. The other members of the Court expressed no opinion, as the case went off on other grounds.

In the present case Mr. Justice Middleton, who ordered the discharge of the defendant, could see no ground for distinguishing between the different provisions of this section and holding some to be imperative and others directory, and could not see why the bringing of the accused before the magistrate on a warrant before proceeding with the trial should be regarded as a defeating of the ends of justice or as practically preventing the making of a conviction for a second offence, and considered that to read into sec. 101 of the License Act the words found in sec. 721 of the Criminal Code,

“if the defendant is personally present at the hearing,” would be legislation rather than interpretation.

In 1903 a case of *Rex v. Dealtry*, 40 C.L.J. 38, was decided by Colter, Co.C.J., who followed *Regina v. Edgar*, and whose references to this enactment in question are most apt. In that case there was no evidence as to the previous offences except what was obtained from the defendant on his cross-examination as to the subsequent offence, and the appeal from the conviction was allowed.

It must, I think, be taken, without elaborating beyond the cases I have referred to, that the weight of authority, as of argument, is in favour of holding that the section was peremptory as to the stage of the proceedings at which the inquiry as to former offences should be had. With Middleton, J., I cannot think that it was or is less peremptory in its directions as to asking the defendant about them. I think the statute now should be construed as it would have been before the revision of the 31st December, 1877, excepting, of course, the amendment of 1909.

But there remains the question whether, granting that it is peremptory, it may not properly be so construed in connection with other sections as to authorise proceeding in the defendant's absence, if he chooses to absent himself altogether. The general provision is that, if present, he shall be asked as to the whole charge, and that, if he is absent, the whole case may go on in his absence or a warrant may issue for his apprehension. And, whether he attends or not, if there is an adjournment and he does not attend, the magistrate may proceed as if he were present. Is it too much to import into the special enactment the assumption that when, on the second branch of the charge, it directs that he shall be asked, that means, as on the first branch, that he shall be asked if he is present? On that I confess to having considerable doubt from the particularity of the directions as to the inquiry going on, if he does certain things which necessarily imply his presence. I cannot help feeling that the Legislature could not have intended to make such a difference between the two branches of the inquiry, although the words may lead or be open to a different construction. The other members of the Court have been able to come to the conclusion that such a meaning may be imported, and my doubt is not such as to warrant me in dissenting from their view.

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The defendant having been discharged from custody, the Crown does not desire his further imprisonment.

I concur in allowing the appeal.

MOSS, C.J.O.:—I do not desire to add anything to what has been said by my learned brothers, further than to observe that in the “bewildering maze” of apparently conflicting statutory provisions and equally conflicting judicial opinions and expressions, my learned brother Middleton might very well feel justified in holding in favour of the liberty of the subject and discharging the defendant. It may be that, even yet, the matter is not wholly freed from doubt.

As it is not the intention of the Crown, as we were assured, further to press the proceedings against the defendant, probably the chief value of our decision is that, perhaps, it may serve to direct the attention of the Legislature to the present state of the enactments with a view to their amendment in such manner as to end future uncertainty as to their intent and meaning.

GARROW, J.A., concurred.

Appeal allowed.

[RIDDELL, J.]

YOUNG V. TOWN OF GRAVENHURST.

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Negligence—Electric Current Supplied by Municipality for Lighting Houses—Municipal Light and Heat Act—Municipal Waterworks Act—Board of Commissioners—Statutory Agents of Corporation—Supply of Electricity, where Obtained—Powers of Board—Effect of Exceeding—Defective System—Dangerous Defects—Person Injured in House—High Tension Current—Failure to Exercise Care—Contributory Negligence, Absence of—Remedy in Contract or Tort—Damages—Elements Considered in Assessing.

In 1903 the defendants, a town corporation, acquired an electric light plant then supplying the town and vicinity. In 1904 the defendants passed a by-law constituting a Board of Commissioners under the Municipal Light and Heat Act and the Municipal Waterworks Act, R.S.O. 1897, chs. 234, 235; and the Board, in and after 1905, took charge of the electrical plant, etc., of the defendants:—

Held, that the liability of a body created by statute must be determined upon a true interpretation of that statute; and, upon the statutes referred to, the position of the defendants was that of principal, and that of the Board of agent; and the defendants were liable for damages occasioned by the act of the Board.

Mersey Docks Trustees v. Gibbs (1866), L.R. 1 H.L. 93, followed.

Held, also, that if it were beyond the powers of the Board to get their supply of electricity from a point eight miles distant, it was not open to the defendants, who knew all about it and adopted it, to set up that they were not liable for the acts of the Board; and, even if this manner of procuring power were *ultra vires* the defendants, they could not set this up as an answer to a claim based upon the negligence of their servants, in a business carried on by them for the benefit and with the knowledge of the corporation; and in any case the causative negligence was within the municipality. On the 8th March, 1910, one of the plaintiffs, a boy, lying in bed in the house of his mother, the other plaintiff, was burned by a current of electricity from the town supply:—

Held, upon the evidence, that the system was a defective one; that the current which caused the injury was not a low tension current of about 110 volts—a current which, without negligence on the part of the defendants, might have been looked for—but a current of high tension which should not have been in the house at all.

The defendants, having taken it upon themselves to conduct an electric light plant, must conduct it without negligence.

Quare, whether the doctrine of *Fletcher v. Rylands* (1866), L.R. 1 Ex. 265, *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, could be applied to electricity.

Any one dealing in electricity is bound to the public to exercise the utmost degree of care in the construction, inspection, repair, and operation of his apparatus and appliances; the defendants, on the evidence, were not careful in construction, they failed in inspection and in repair; and, without reference to the doctrine of *Fletcher v. Rylands* or the principle of *res ipsa loquitur*, the defendants should be considered liable for negligence.

Held, also, that there was no contributory negligence; for, although the bed upon which the boy lay was in an iron bedstead, and the bedstead itself in contact with a radiator, the radiator being in contact electrically with the earth, there was nothing to indicate that such a state of affairs could be dangerous—it was usual and common, and no warning of danger to be anticipated from it had been given.

Semble, that supplying the high tension electricity was a breach of contract with the owner of the house, the boy's mother, and she at least could sue in contract.

Damages assessed at \$2,250 for the mother's disbursements on account of the injury to her son and her trouble and inconvenience; and at \$7,500 for the son's injuries—the loss of a hand and two holes burned through his skull to the brain.

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ACTION for damages for personal injuries sustained by the plaintiff John Young by reason of the negligence of the defendants, as alleged, and for expenses, etc., incurred by the plaintiff Anna Young, the mother of John Young, on account of his injuries.

November 14 and 15. The action was tried before RIDDELL, J., without a jury, at Barrie.

W. Nesbitt, K.C., and F. R. MacKelcan, for the plaintiffs.

N. F. Davidson, K.C., for the defendants.

November 18. RIDDELL, J.:—In 1903 the Town of Gravenhurst acquired the electric light plant then supplying the town and vicinity, which, having been initiated by one Fletcher, had become the property of one Fielding. The town corporation had made an offer under the provisions of what is now the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 566, which offer was declined. Arbitrators were appointed and made their award, whereupon Fielding conveyed the plant to the town corporation, including two lots, machinery, transformers, dynamos, etc., etc. He also transferred the contracts he had for the supply of light or electricity. In 1904 the town passed a by-law constituting a Board of Commissioners under the Municipal Light and Heat Act and the Municipal Waterworks Act, R.S.O. 1897, chs. 234, 235; and the Board, in and after 1905, took charge of the electrical plant, etc., of the town.

On the 8th March, 1910, the plaintiff John Young, a lad of eleven years of age, lying in bed about 7 o'clock in the morning, was terribly burned by a current of electricity from the town supply—his left hand was so injured that it had to be amputated, and his skull was literally burned through to the brain in two places.

He and his mother brought action against the town corporation, and the case came on for trial before me, without a jury, at Barrie, on the 14th and 15th November.

Every point was most strenuously and ably contested by counsel for the defendants; and the only doubt which I have entertained since the close of the evidence is due to his ingenious and learned argument.

I attach a diagram and description:—

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In the plan is shewn (diagrammatically, of course, and not at all to scale) the position of affairs. The poles run from the sub-station, and enter from the east at X; the dotted lines running on the poles from X to A by F and G represent the wires carrying the primary current of about 2,200 volts. At pole A is the transformer, from which run the wires (indicated by black lines) carrying the secondary current of 110 volts, and supplying the house of Baily and the plaintiff. These houses are, therefore, on the same circuit. The guy wires are also represented by dotted lines; that at E was attached to an iron anchor sunk in the earth, and that at C attached to a tree. There was another tree, H, near the transformer pole, about which some evidence was given. The injured lad was in the house indicated by the rectangle marked "Mrs. Young's house."

I take up the legal objections which go to the very root of the action. Mr. Davidson contends that this action does not lie against the town corporation at all, but that, if any one be liable, it can only be the Commissioners.

By reference, secs. 40 to 47 of R.S.O. 1897, ch. 235, are made part of R.S.O. 1897, ch. 234 (R.S.O. 1897, ch. 234, sec. 14). These sections authorise the council, by by-law assented to by the people, to provide for Commissioners for the purpose of exercising and enjoying the powers, rights, authorities, and immunities conferred upon the corporation by the Act: sec. 40 (1). And, upon their election, all the powers, rights, authorities, or immunities which under the Act might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the Commissioners and the officers appointed by the Commissioners, and the council thenceforth during the continuance of the Board of Commissioners shall have no authority in respect of such works: sec. 40 (2). The council may (1) by itself or (2) by its officers exercise and enjoy these powers, or this may be done (3) by a Board of Commissioners—and in the last case the council may assume the function itself by discharging the Commissioners.

Both in ch. 234 and in ch. 235, it is the "corporation" which is given powers of supplying electricity, water, etc.; and it is "the inhabitants of a town," etc., who are formed into a body corporate, and this body corporate is the "corporation" referred to (Con-

solidated Municipal Act, 1903, secs. 5 to 8), although "the powers of every body corporate under the Act shall be exercised by the council thereof:" sec. 10.

The whole effect of sec. 40 of R.S.O. 1897, ch. 235, is to permit the council, instead of acting for the "corporation," i.e., the "body corporate" themselves, to deliver this agency to officers appointed by the council or to Commissioners. The Commissioners then become the body which acts for the corporation—and so "statutory agents."

In *McDougall v. Windsor Water Commissioners* (1900), 27 A.R. 566, a Board of Water Commissioners were sued—the statute 37 Vict. ch. 79 by sec. 2 made the Commissioners a body corporate and gave them all the powers necessary to enable them to manage the system of waterworks then established, to extend the same and to construct new or additional ones. The plaintiff, in good faith, entered into a contract with the Commissioners; and, becoming entitled to be paid a certain sum under the terms of the contract, sued the Board. The Court of Appeal held that the Board were simply statutory agents of the corporation "The city is the principal, the commissioners, the agent:" *per* Osler, J.A., at p. 577. Although it was in the Supreme Court contended for the plaintiff that he should be allowed to retain the judgment granted him at the trial, notwithstanding the fact that the defendants could not satisfy it, that Court sustained the Court of Appeal—(1901), 31 S.C.R. 326. "The water commissioners corporation are not by the Act made paramount to the city corporation" (p. 337), the "important question" having been raised (see p. 328) "whether the corporate body called the Water Commissioners of the City of Windsor are agents only of the municipal corporation of the city . . . or . . . are paramount to the municipal corporation. . . ."

In *Ridgway v. City of Toronto* (1878), 28 C.P. 579, the effect of an Act of 1872 was considered, *viz.*, 35 Vict. ch. 79 (O.) By sec. 1, the Corporation of the City of Toronto were given authority, through the agency of Commissioners, to build, maintain, etc., waterworks; by sec. 2, the Commissioners were made a body corporate with all powers to build, etc. The Court held that the city corporation were liable for the acts of the Commissioners, the Commissioners' corporation being but the city's agents. It is true

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that the word "agency" appears in the statute, but it is not used in the technical sense, and adds nothing to the meaning—the Act might have read "through Commissioners," and then it would have meant precisely the same thing.

Mayor, etc., of New York v. Bailey (1845), 2 Denio 433, *Mayor, etc., of New York* (1842), 3 Hill 531, is to the like effect.

Trotter v. City of Toronto (1878), 28 C.P. 574, 29 C.P. 365, is in no way opposed to this view.

In *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, the Commissioners of the Niagara Falls Park were held to be but agents for the Crown. In that case most of the cases relied upon by the defendants here were cited and some of them considered at length in the judgment.

Gibbs v. Trustees of the Liverpool Docks (1856), 1 H. & N. 439, is urged as authority for the opposite view. There the Trustees of the Liverpool Docks were a statutory corporation owning the docks. By statute 6 Geo. IV. ch. 187, secs. 3, 4, a committee was appointed, twelve nominated by the corporation and eight by the merchants, who "should have, use, and exercise exclusively all and every the powers and authorities, etc., of the Liverpool Dock Acts" vested in the trustees, subject to a power of veto in the trustees. It was held that the corporation were not liable for the acts of the commissioners. Pollock, C.B., gives judgment on this ground; Alderson, B., agrees with him, but puts the decision on another ground as well; Martin, B., upon the latter ground only; while Watson, B., concurs without giving reasons. The judgment was reversed in Cam. Scacc. (1858), 3 H. & N. 164, counsel for the defendants expressly abandoning the contention that the corporation were not liable for the acts of the committee (pp. 174, 175). An appeal was dismissed by the House of Lords, *sub nom. Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H. L. 93. In all the many cases in which this case is mentioned, I do not find that any one has ever again made the suggestion that a statutory commissioner is not merely an agent. The rule is authoritatively laid down in the *Mersey Docks* case "that in every case the liability of a body created by statute must be determined upon a true interpretation of that statute." See *Sanitary Commissioners of Gibraltar v. Orfila* (1890), 15 App. Cas. 400, at pp. 408, 409.

We are, therefore, to examine the legislation and see the position intended to be given to the Board.

The property and income are those of the corporation; the profits are the profits of the corporation, and all that the Board is to do, might have been done by another agent of the corporation, *i.e.*, the council. It is impossible to consider the Board either as principal or servant or agent of the council. The result is that it is the corporation of the town which is the principal, and the Board of Commissioners but the agent; and, unless there be more in the case, the corporation is properly sued. This is the conclusion arrived at by my brother Latchford, in an application to compel Briddick to submit to examination as an officer of the defendants; I have thought it right to consider the question anew, the decision of my learned brother being in an interlocutory matter: see 2 O.W.N. 118.

The *Mersey Docks* case also decides that the principle upon which a private person, or a company, is liable for damages occasioned by the act of a servant, applies to a corporation which has been intrusted by statute to perform certain works, and to receive tolls for the use of those works. This is the position of the defendants here (R.S.O. 1897, ch. 235, sec. 47).

Then it is contended that the corporation cannot be liable for the acts of the Commissioners, because they got their supply of electricity from a point eight miles distant, which, it is contended, is *ultra vires* the Commissioners. Even if this were *ultra vires* the Commissioners, the defendants knew all about it and adopted it, and consequently the defence is not open to them: *Ridgway v. City of Toronto*, 28 C.P. 579. And, even if this manner of procuring power were *ultra vires* the corporation, the corporation could not set up this as an answer to the negligence of their servants.

In some cases a corporation is protected from liability upon a contract *ultra vires* made by itself or its agents, but never from the results of negligence by its servants in a business carried on by them for the benefit and with the knowledge of the corporation. Brice on *Ultra Vires*, 3rd ed., p. 435, gives a number of cases, mostly American.

Doolan v. Midland R.W. Co. (1877), 2 App. Cas. 792, is a case much like what I suggested on the argument, *i.e.*, suppose a railway company having power only to build from Toronto to Hamilton were to build from Toronto to Guelph, and in the operation of the

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road were, by the negligence of servants, to do an injury, could it be argued that the company were not liable in tort? In the case in 2 App. Cas. the Midland Railway Company had no authority to own or work steamboats; the company did operate steamboats; but it was held that the company could not set up such illegality as an answer to a claim for damages arising out of the working of such steamboats: see especially p. 806. Much reliance seems to have been placed upon this defence by some of the Judges in the Courts below, but the proposition received its quietus in the House of Lords. "It is impossible to suppose that the Legislature intended those companies who were wrongfully working steamers to be in a better position than those who were rightfully working them."

And in any event the wrong in the present case was done within the limits of the municipality; and the causative negligence was within the municipality.

Then as to the facts. There was much evidence given, of more or less value, including considerable expert evidence. Taking the evidence as given, with the weight which I think, from having seen the witnesses, should be attached to it, I find the following facts:—

The system of the defendants is a very defective system and suffering from want of money to put it into and keep it in proper condition.

At a point on Bay street there is a pole, marked D on the plan, to which was attached a guy wire running down to an iron anchor. This guy wire was wrongly placed so that it could come into contact with primary wires carrying electricity of a voltage of 2,200. This is admittedly wrong construction and dangerous. The "strain insulator" on this guy wire was ruined certainly as early as Sunday the 6th March. This breaking was something naturally to be expected to occur, the result being that, when the guy wire came in contact with the primary wire, a current ran into the earth, thus throwing an extra strain upon the other of the primary wires (one of these was, of course, + 1100 and the other — 1100).

During the evening of the 7th March, 1910, Wright, who was on duty at the power-house, saw, between 9.30 and 11 p.m., that there was a serious leakage, and at once communicated the fact to Briddiek, the manager. It was then the duty of Briddiek to

discover the leak, as it was dangerous to life. Briddick denies receiving this information and admits that he made no investigation. At the trial he said that, as soon as he heard of the accident, he lamented that he had not been informed of the leak. At the trial, too, he said that, if he had examined for the leak, the accident would not have happened. It is true that he withdrew this statement when taken in hand by the defendants' counsel; but I believe and find that, had he looked for the leak on the evening of the 7th March, he would have found it, and the accident would not have happened.

Either Wright did not report the trouble at all, in which case he was negligent; or he did—and I find as a fact that he did—in which case Briddick was negligent—the result in either case being the same.

By 11 p.m. the trouble ceased, the guy wire, no doubt, having broken contact with the primary—there were phenomena observed by Dr. Parfitt, Mrs. Parfitt, and others, the same evening, due to the escape by this guy wire of high voltage electricity, which phenomena I do not stop to discuss.

No current of electricity can take place unless a complete circuit is established; and the current down the guy wire E must needs get back to the primary wires so as to form a circuit. In some way, which was not made perfectly clear, there was a communication between the primary wires and the secondary wires leading to the house of Mrs. Young—I think through the transformer, which may have been tampered with subsequently, or may have “healed” itself. The evidence of experts for the defence in respect of “healing” of this particular transformer is of no weight, being based wholly upon what they were told by an employee at the electric works. This communication between primary and secondary wires is shewn, amongst other things, by the fact that the tree C, within Mrs. Young's grounds, received, as I find it did receive, through the guy wire attached to it, a current of electricity of high tension, much higher than the 110 volts which the secondary wires were intended to carry. There may have been and probably were other “grounds” which would divide the current flowing through E in inverse proportion to their resistance, but that a current of some 600 volts did go through the guy wire at C I have no doubt. This smoking or steaming at C took place a little before 8 p.m., and while the guy wire at E

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was still intact; and I find that Mr. Briddick is in error in saying that he cut the guy wire at E before this time.

On the evening of the 7th March a current of high tension manifested its presence in the house of Mrs. Young by unmistakable phenomena; and that this current came from the secondary wires is, to my mind, clear. At that time there can be no doubt there was connection between the primary and secondary wires, as well as connection between the earth and the primaries.

It is manifest that there was in this badly built system an intermittent communication between the earth and the primary wires; and that this is exceedingly dangerous, no one doubts or can doubt.

That it was the guy wire at E which was the cause of the trouble, I think is certain, and I so find.

That it was the duty of Wright at the power-house to report the existence of a leak to the manager, and that of the manager to locate the leak and remedy the defect immediately, equally admits of no kind of doubt.

It may be true, as he says, that Briddick was short of men; but that is no excuse for the defendants—if they run a dangerous business at all, it is their duty to have a sufficient number of men to detect and guard against danger.

There is no duty cast upon the municipality to conduct an electric light plant or even to light the streets: *Randall v. Eastern R. Co.* (1871), 106 Mass. 276, 8 Am. Rep. 327, and cases cited, especially *Macomber v. City of Taunton* (1868), 100 Mass. 255; *Lyon v. City of Cambridge* (1884), 136 Mass. 419.

But, if the municipality does take it upon itself so to conduct an electric light plant, it must conduct it without negligence: *City of Freeport v. Isbell* (1876), 83 Ill. 440, 25 Am. Rep. 407; *Canavan v. Oil City* (1898), 183 Pa. St. 611; *McHugh v. City of St. Paul* (1897), 67 Minn. 441; *Gaskins v. City of Atlanta* (1884), 73 Ga. 746.

This duty is owed not only to the public using the streets, but also to persons not on the highway.

The stage then was all set for a tragedy—the plaintiff John Young, lying in his bed about 7 in the morning of the 8th March, with the light which hung over his bed for reading purposes turned on, noticed a sparkling, which indicated, as he thought,

that the lamp was going out; he then took hold of the oscillating lamp with his left hand, and knew no more till some time after. His mother came into the room and saw his hand blazing and also his head where it came in contact with the iron bedstead—then his hand dropped from the lamp, and the blazing ceased. Medical aid was sought at once. Dr. Parfitt was in attendance without delay, and other surgeons were sent for. Mrs. Parfitt saw, about 7.35 a.m., the guy wire at E steaming, and at about 7.45 the tree C smoking or steaming—throwing off a white vapour. At this time, as I have already said, Briddick had not cut the guy wire E; this he did later, and the danger was over.

Experts called for the defence gave evidence that the injuries to the plaintiff John Young were, in their opinion, caused by a low tension current of 110 volts—and that all over this continent persons using electric light live in constant danger of suffering such injuries. All that is needed, they say, is to place the body in contact with a radiator or a water-pipe and put the hand to an unprotected lamp shoulder, and the mischief may be done. This I do not believe.

No one doubts that a spark from a low tension circuit will burn—a burning match is as hot as a torch—but the case is different with a circuit or current of electricity.

A number of experiments were made at the court-house with the current at 110 volts, and the current was passed through human bodies—amongst them that of one of the experts for the defence—without more than temporary discomfort.

The defence experts had conducted a number of experiments in Toronto as to the effect of a current of 110 volts in cooking beefsteak, lamb and mutton. However interesting these experiments may be from a culinary point of view, I have no means—and none was suggested—of applying the results on dead beef and mutton to living human cuticle, flesh, and bone. No assistance is given the Court by experiments that are of use—if to any one—only to cooks.

In addition to the evidence of the electrical experts called for the plaintiff, whose evidence I believe, and who testified that the current causing the injuries was not a low tension current of about 110 volts, and consequently a current which, without negligence on the part of the defendants, might have been looked for, but

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that it was a current of high tension, which should not have been in the house at all, the plaintiffs called Dr. Parfitt, who testified that the condition of the lad indicated and would prove that the current was of high tension. The heart of the patient was beating full and regularly immediately after the shock, but his breathing had been temporarily suspended. The witness said that high tension currents (when they do not kill) arrest the breathing, but do not stop the heart. I accept this evidence. If I am to be permitted to use knowledge obtained from scientific and medical treatises—as to which Wigmore on Evidence, secs. 1690, 1700, 2566, may be consulted—the testimony of Dr. Parfitt will be found to be supported by authority. Of those which I have by me, I quote from Tousey's Medical Electricity (Phila. & London, 1910), p. 346: "High tension currents cause death by respiratory paralysis, low tension currents by cardiac paralysis, if they cause death at all." H. Lewis Jones, Medical Electricity, 4th ed. (1904), p. 251: "Strange to say, the effect of currents in arresting the heart is more evident with small than with large currents, and is not observed with very large currents, so that Prof. Battelli even states that a heart arrested by an electric shock of small magnitude can be caused to recommence beating by a current of large magnitude sent through it afterwards. . . . In cases of accident from contact with high pressure conductors, and when large currents have traversed the patient's body, the heart beat may not be arrested, but there may be a profound inhibition of the respiratory centre. . . . The arrest of respiration is not inevitably fatal, but may be recovered from. . . ."

There are others to the like effect; and I have seen none giving any opposite view.

On all grounds, then, I find the contention of the defendants that the current which did the mischief was the ordinary 110 volt current disproved.

It may be that the doctrine of *Fletcher v. Rylands* (1866), L.R. 1 Ex. 265, *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, will be considered to apply in all its stringency to electricity. My brother Britton, in a case tried some years ago at Chatham, ——— v. *Bradley*, held that it applied to dynamite; the Court of Appeal, in affirming the judgment, did not decide that the principle did not apply to dynamite; they only said that, granting

that it was not applicable, there was clear evidence of negligence. If the principle applies to dynamite, it is hard to see why it does not apply to electricity. If and when the point comes up for decision, it may become necessary to consider the effect of such cases as *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co. v. Cape Town Tramways Cos.*, [1902] A.C. 381; *Dumphy v. Montreal Light Heat and Power Co.*, [1907] A.C. 454; *Hinman v. Winnipeg Electric Street R.W. Co.* (1906), 16 Man. L.R. 16. Mr. Justice Davies does not accede to the proposition: *Royal Electric Co. v. Hévé* (1902), 32 S.C.R. 462, at p. 470; but Taschereau, J., at p. 465, and apparently Sedgewick, J., did not agree with him.

Much may be said for the view that a corporation undertaking to furnish electricity of a voltage of 110 must, at all hazards, keep from the building supplied, and from the wires intended to carry only 110 volts, their electricity of a higher voltage, if that is dangerous. It may be that a corporation which contracts to deliver a tiger cub into a cage on certain premises are bound to see to it that a full-grown tiger of theirs is not delivered in its place.

In the present case, however, I do not need to consider whether the defendants were bound, at all hazards, to keep their high tension current from entering the house in which the plaintiffs were—the facts of this case shew that they did not take the high degree of care that the law demands from a corporation trading in so dangerous an element as electricity (32 S.C.R. at p. 466): and that is sufficient to saddle them with responsibility for the disastrous consequences.

Any one, individual or corporation, dealing in electricity “is bound to the public to exercise the utmost degree of care in the construction, inspection, repair and operation of its apparatus and appliances”—10 Am. & Eng. Encyc. of Law, 2nd ed., pp. 872, 873—must “exercise the high degree of skill, care, and foresight required of persons engaging in operations of a dangerous nature:” *Royal Electric Co. v. Hévé*, 32 S.C.R. 462.

The defendants were not careful in “construction”—the guy wire E should not have been placed where it could come in contact even occasionally with the live wire of high tension. The secondary wires should have been properly insulated, etc., etc.

They failed in “inspection”—none of the defects seem to have

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been discovered; and there does not seem to have been any system of inspection; even when the manager, Briddick, was notified of the leak, he did not inspect as he should have done. He did not discover the break in the insulator or guy wire E till Tuesday morning—that having been broken at least as early as Sunday.

In “repair”—the defects were allowed to remain to do their work—the likelihood of danger should have been apparent to any one, and the evil should have been guarded against.

And there was no contributory negligence. It is true that the bed upon which the boy lay was in an iron bedstead, and the bedstead itself in contact with a radiator, the radiator being in contact electrically with the earth, but there was nothing to indicate that such a state of affairs could be dangerous—it was usual and common, and no one had been warned of any danger to be anticipated from such an arrangement.

Without, then, calling in the doctrine of *Fletcher v. Rylands*, and without appealing to the principle of *res ipsa loquitur*, I am of opinion that the defendants are liable as for negligence.

I do not think it necessary to consider the case in the light of contract. It may well be, however, that the defendants entered into a contract to supply the plaintiff Anna Young with electricity of a safe voltage—about 110 volts—this, as they knew, was for the use of all the members of her household, including her son, the plaintiff John Young—and that, therefore, they were, so far as she is concerned, bound by contract to supply the low tension electricity. It would probably be held that supplying the high tension electricity was a breach of contract with her; and that she at least could sue for her damages.

There being no fraud, it might be the son could not take advantage of the principle of *Langridge v. Levy* (1838), 4 M. & W. 337; and he might have difficulty in establishing any liability in contract to him.

I do not pursue the subject, and notice the argument but to shew that it has not been overlooked. The case is best put, in my view, on tort.

As to damages, Mrs. Young has already disbursed or become liable for \$1,724.90; she will require to supply several artificial arms of different sizes before her son is of age, costing, say, \$150. Another operation, at least, will be necessary, costing \$30, and

the expenses to Toronto will run up to at least \$15; in cash, then, she will be out at least \$1,919.90.

Then the trouble and inconvenience to which she has been and must necessarily be put must be considered—\$330.10 is not much, but, on the contrary, is probably far too little to allow. She will have a verdict, then, for \$2,250.

Her son is bereft of a hand; and, although it is satisfactory to know that his mother intends and is able to give him a first-class education, he must at all times feel the loss. His skull can never fill up the holes burnt through it; his brain must at all times be destitute at these places of its natural cover; he can never lead a boy's life with boys, or a youth's life with youths. He cannot join in the usual athletic sports of the average student, and, while it may be that athletics is vastly overrated in the colleges and universities, every young man of ordinary make-up should have his chance at least of sharing in the sports. Then the necessarily somewhat solitary and non-social life the lad is doomed to lead is itself an evil—man is a social animal, and one who shuns his species must needs pay the penalty, and no light penalty.

As to his mind, I have never seen a boy of his age more intelligent—his answers were a model of propriety, not only in manner but also in matter; his capacity for comprehension and expression was as great as his courtesy; he was not only well-bred, but he was also thoughtful. I could not see that his brain or mind had suffered by the injury; and it is a pleasure to be able to say thus much. But there is the danger of the brain being incapable of protracted and continuous effort—in brief, of “brain fag” setting in when study is seriously attacked—a very real danger of a very real infliction. Assuming that he makes his way through the curriculum of studies, his handicap is not over—no man in any walk of life is as good without a brain and with holes in his skull as he would otherwise be.

I know of no rule to assist me in assessing the damages, except the time-honoured rule that where the injury is not wilfully inflicted, the damages must be reasonable. In view of the serious extent of the injuries, the pain already suffered and the long time this boy of eleven is to be expected to lie under the handicap of these terrible wounds and that terrible maiming, I think the sum of \$7,500 a reasonable sum to allow.

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The very alarming state of the plant, etc., of the defendants, is said to be not at all unusual. If that be the case, thousands are in daily peril of death or maiming—a state of affairs which loudly calls for legislative interference. The most ordinary regard for human life and limb would seem to necessitate some measure of governmental supervision and the most strict and searching of official inspection.

[DIVISIONAL COURT.]

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RE HENDERSON ROLLER BEARINGS LIMITED.

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D. C.

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Assignments and Preferences—Assignment for Benefit of Creditors—Goods Seized by Sheriff—Interpleader—Claim of Assignee—Rights of Interpleading Creditors—Priority—Assignments and Preferences Act, sec. 14—Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 6, sub-sec. 4—Status of Assignee.

The company transferred goods by bill of sale to A. on the 2nd July, 1909. Seizure having subsequently been made by a Sheriff, under certain executions against the company, of the goods transferred to A., and A. having made a claim, an interpleader issue was directed on the 10th May, 1910. This was determined against the claim of A. on the 30th September, 1910, by a judgment which, in effect, declared that A. held the goods subject to the executions against the company. On the 4th October the final order of interpleader was made, setting forth that the Sheriff, in lieu of selling the goods, had, at the request of A. and the company, continued in possession pending the trial of the issue, and directing the Sheriff to sell the goods, and out of the proceeds to pay the executions, costs and expenses—"the said creditors having a special lien therefor." On the 8th October the company made a general assignment to M. for the benefit of creditors, under the Assignments and Preferences Act, and a confirmatory assignment on the 13th October. A. transferred the assets to another company, by an instrument dated the 1st October, and that company transferred to the company in question by an instrument of the same date, but it was admitted that these instruments were not in fact executed until after the general assignment and confirmatory assignment. M. made a demand upon the Sheriff for the property in his hands, and the Sheriff applied for an interpleader order as between M. and the execution creditors:—

Held, that the special provisions of the Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 6, sub-secs. 4 and 5, in favour of interpleading creditors, were to be regarded as an exception to the general law regarding the ratable distribution of assets, either under the Creditors' Relief Act or the Assignments and Preferences Act; and that the execution creditors were entitled as against M. to the priority given them by the former order.

History of the legislation and review of the authorities.

Held, also, that nothing passed by the assignment to M. but a potential right to vacate, by proper means, the transfer to A., which had already been declared fraudulent as against the interpleading creditors; and the voluntary retransfer by A. did not put the assignee, M., in any better position as regards those creditors. The transfer by the company to A. was valid as between them, and the title and property were out of the company altogether. The circumstances of the case withdrew it from the scope of the Assignments and Preferences Act, 10 Edw. VII. ch. 64, sec. 14, which

applies to goods of the insolvent validly assigned to the assignee under the Act. The goods were not those of the company at the time of the assignment, and the assignee could not take a better title as against the interpleading creditors than A. could give.
Judgment of CLUTE, J., affirmed.

THIS was an appeal by N. L. Martin, the claimant, as assignee, from an order of the Master in Chambers, dated the 15th October, 1910, directing that a motion made on behalf of the Sheriff of Toronto for an interpleader order should be adjourned until after the Sheriff should have sold the goods in question, and further directing that the motion might be resumed at any time after the Sheriff should have held the sale, upon proper notice.

October 25. The appeal was heard by CLUTE, J., in Chambers.
A. H. F. Lefroy, K.C., for the appellant.
Grayson Smith, for the execution creditors Fowler and Eckardt.
J. G. O'Donoghue, for the Queen City Foundry Co.
McLarty (Heyd & Heyd), for Gregson.
R. J. MacLennan, for the Sheriff.

October 27. CLUTE, J.:—Seizure having been made under certain executions against the Henderson Roller Bearings Limited by the Sheriff of the City of Toronto, one Atkinson made claim thereto, and, upon the application of the Sheriff, an interpleader order was made, bearing date the 10th May, 1910, directing that, upon payment into Court by the claimant of the total amount of the executions and of other claims as therein provided, or upon giving security as therein required, and upon payment of the Sheriff's costs and expenses, the Sheriff do withdraw from possession of the goods, and that, unless such payment be made or security be given, the said Sheriff should proceed to sell the said goods and chattels, or sufficient of them to cover the amount of the executions, and pay the proceeds thereof into Court to abide further order.

It was also thereby further ordered that the parties proceed to the trial of an issue, in which the claimant Atkinson should be plaintiff and the execution creditors be defendants, the question to be tried being whether, at the time of their seizure by the Sheriff, the said goods and chattels were the property of the claimant as against the execution creditors, or any of them; and further provision was made that any other execution creditors desiring to take

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part in the contest of the said issue should be at liberty to do so, upon placing their executions in the hands of the Sheriff within twenty days from the date of the order, and notifying the solicitors for the execution creditor Fowler of their desire to come in, and of their agreement to contribute *pro rata* to the expenses of the contest. The question of costs as between the execution creditors and the claimant and all other questions were reserved to be disposed of by the Judge who should try the issue, and any questions not disposed of by him were to be disposed of thereafter in Chambers.

The issue was tried by Latchford, J., and decided in favour of the execution creditors; and he not having disposed of the interpleader costs and other costs, and it further appearing that the Sheriff, in lieu of selling the goods and chattels in question, pursuant to the said order of the 10th May, 1910, at the request of the claimant and of the Henderson Roller Bearings Limited, and with the consent of the execution creditors above-named, had continued in close possession of the goods and chattels pending the trial of the said issue: it was further ordered on the 4th October, 1910, that the costs of the said interpleader proceedings, and of that application, including costs of the Sheriff, be paid by the claimant to the execution creditors and to the said Sheriff, and that, in default of such payment, the costs be paid by the said Sheriff out of the proceeds of the sale of the said goods and chattels as therein provided; and, after making further provision for the payment of certain costs, it was further ordered that the Sheriff do proceed to sell the said goods and chattels in question, or sufficient thereof to cover the executions of the creditors, including all the Sheriff's fees, poundage, etc., and costs of the Sheriff and the execution creditors of the interpleader proceedings, and of the said issue out of the proceeds of such sale, the Sheriff to pay all such executions and costs and expenses, the said execution creditors having a lien therefor.

On the 8th October, 1910, the Henderson Roller Bearings Limited made a general assignment for the benefit of creditors to N. L. Martin, and on the 11th October the said Martin, as assignee, made a demand upon the Sheriff claiming the property of which the Sheriff was in possession, whereupon the Sheriff, on the 15th October, 1910, made an application in Chambers for an interpleader order as between the said Martin, as assignee, and the execution creditors. Upon that application the Master in Chambers, on the

same day, ordered that the motion be adjourned until after the Sheriff should have sold the said goods and chattels in question, and further ordered that the motion might be resumed after the said sale. From that order this appeal is taken.

The question, therefore, is as to whether the assignment to Martin takes precedence of the executions and orders in this case, so as to give the assignee the right to the possession of the goods and chattels so seized, and in possession of the Sheriff. The assignee claims under the Assignments and Preferences Act, 10 Edw. VII. ch. 64, sec. 14 (O.) This section declares that an assignment for the general benefit of creditors under this Act shall take precedence of . . . judgments and executions not completely executed by payment . . . subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the Sheriff's hands, or to the lien, if any, for his costs of the creditor who has the first execution in the Sheriff's hands.

The creditors, on the other hand, claim that, under the Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 6, sub-sec. 4 (O.), they are entitled to have their executions paid in full. That section provides that "where proceedings are taken by a Sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute *pro ratâ* in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates."

In *Clarkson v. Severs* (1889), 17 O.R. 592, the Sheriff, under a writ of execution, sold certain lands and received the purchase-money. Before payment to the execution creditor, the debtor assigned for the benefit of creditors. The assignee then claimed the money in the Sheriff's hands. It was held that the assignee was not entitled to the money, and that the writ in that case was executed by the sale of the lands and receipt of the money, which then became the property of the execution creditors.

The present case differs in that the property has not been sold. Had the goods been sold as directed by the order of the 10th May, there is no doubt that the execution creditors would have been entitled to the proceeds of such sale, less the Sheriff's and other expenses in connection with the issue.

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In *Re Bank of Hamilton and Durrell* (1888), 15 A.R. 500, instead of directing an issue, the Court, upon an application for an interpleader order, heard argument and barred the claimant, and thereupon the Sheriff proceeded to sell the property and made an entry under the Creditors' Relief Act. Certain other creditors delivered certificates to the Sheriff within the proper time, and the Sheriff thereupon framed a scheme for the distribution of the money as if no interpleader order had been had. On an appeal from this the County Court Judge gave the whole fund to the plaintiff, and from this order an appeal was taken to the Court of Appeal. Burton and Patterson, J.J.A., were of opinion that, as there was a contest between the execution creditor and claimant, and an adjudication in favour of the former, the proceedings which took place upon the interpleader summons came within sub-sec. 4 of sec. 3 of the Act, and entitled the execution creditors to the whole proceeds of the property. Hagarty, C.J.O., thought the circumstances of the case did not bring it within that section, and the appeal should be allowed and the moneys distributed as if no interpleader proceedings had taken place. Osler, J.A., took the view that the order disposing of the interpleader summons was not a proceeding under the Interpleader Act, because it did not shew upon its face the consent of parties to the summary disposition of the claim; but, even if it was an interpleader proceeding, it was not within the mischief of the Act, which intended to provide only for the case where an issue has been directed.

The differences of opinion in that case arose from the circumstance that, in the opinion of two Judges, the case did not fall within the Act owing to the fact that no interpleader issue had been tried. In the present case, there having been an interpleader issue directed and tried, the observations of Patterson, J.A. (p. 508), are applicable to the present case: "The general scheme is that all creditors who have executions or certificates in the Sheriff's hands at the time of, or within 30 days after, his entry of the notice of the levy shall share ratably in the money. But if an adverse claim to property seized under the executions shall have been made; and if the Sheriff has taken proceedings for relief under the Interpleader Act; and if the adverse claim is contested by one or more of the creditors; only those creditors who are parties to the proceedings taken by the Sheriff, and who agree to contribute *pro ratâ* to the

expense of contesting the adverse claim, shall be entitled to share in any benefit which may be derived from the contestation, so far as may be necessary to satisfy their executions or certificates."

In *Reid v. Murphy* (1887), 12 P.R. 338, it is said by Boyd, C.: "After an interpleader order is made at the instance of the Sheriff, the special jurisdiction of the Court under the Act relating to interpleader arises, by which the writ of execution as such ceases to operate, and the Sheriff in selling the goods seized thereunder acts not for the execution creditor, but for the Court, under the interpleader order."

In the present case the Sheriff, under interpleader order, is directed to sell. The sale, if had, is not under the execution, but under the order of the Court. That order was not appealed from and remains in full force. In such a case, I am of opinion that sec. 6, sub-sec. 4, of the Creditors' Relief Act applies, and that the execution creditors are entitled to be paid their executions and the costs and charges directed by the order to be paid, in priority over other creditors of the insolvent company. In this respect, it seems to me that the right of the assignee is no higher than that of the debtor as against the execution creditors.

As there would seem to be no facts in dispute, the order appealed from may be varied by declaring that the execution creditors are entitled to the proceeds of the sale as against the assignee. In other respects the appeal will be dismissed with costs.

The assignee, Martin, appealed from the order of CLUTE, J.

November 16, 17, and 18. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

Upon the hearing of the appeal it was admitted that the company assigned to Martin on the 8th October (a confirmatory assignment being made on the 13th October). Atkinson conveyed to the American company by instrument dated the 1st October, 1910, and the American company conveyed to the company in question by instrument of the same date. Neither of these last two instruments was in fact executed until after the assignment and confirmatory assignment.

A. H. F. Lefroy, K.C., for the assignee. An objection is made to the assignee's title on the ground that, when the debtor company

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made the assignment, it had no interest in the property in question, which was not conveyed to it until after the assignment was made. This objection is sufficiently answered by reference to the well-established principle in law that a conveyance under seal, as the assignment to the assignee Martin was, raises an estoppel which is "fed" by a subsequent conveyance from the party in whom the legal title is vested: Campbell's Ruling Cases, vol. 1, p. 480. This principle applies to personal, as well as to real property: see Am. & Eng. Encyc. of Law, 2nd ed., vol. 11, p. 411, where it is laid down that "the rule seems to be established that, in sales of personalty, even without any express covenant of warranty, the title afterwards acquired by a vendor in property which he has sold passes to the grantee." It is true that reference is there made to an old case of *Bryans v. Nix* (1839), 4 M. & W. 775, never cited now, in which Parke, B., expresses a doubt as to whether this doctrine applies to a sale of personal chattels, but his dictum applies only to the case of a subsequent purchaser, and we find no reference to the case, on the point in question, in the Encyc. of the Laws of England, 2nd ed. A further objection is made to the assignee's claim, on the ground that the property could only vest in him subject to the lien of the execution creditors under the judgment of Latchford, J., on the issue tried before him between these creditors and Atkinson. To this objection it may be answered that the judgment in question did not avoid the deed to Atkinson except against these creditors, and that, under the Assignments and Preferences Act, 10 Edw. VII. ch. 64, sec. 14, the assignment to Martin takes precedence of all judgments and executions not completely executed by payment. The constitutionality of sec. 14 is undoubted: *Attorney-General for Ontario v. Attorney-General for the Dominion of Canada*, [1894] A.C. 189; and there is no reason why any special sanctity should be attributed to the interpleader sections of the Creditors' Relief Act such as should make judgments under these sections an exception from the operation of sec. 14. *Clarkson v. Severs*, 17 O.R. 592, cited by the learned Judge below, is distinguishable, as in that case the execution was in the hands of the Sheriff before the Creditors' Relief Act was passed, and the goods had been sold under it. *Reid v. Murphy*, 12 P.R. 338, also cited in the Court below, was an interim order, and did not involve a contest as to the rights of the assignee. Even if the delay caused by the present

application should have the result of preventing the execution creditors from completing their execution by sale, that is no reason why the assignee should not have the rights secured to him by statute: MacLennan on Interpleader, pp. 262, 263, and cases there cited.

Grayson Smith, for Fowler and Eckardt, execution creditors. The assignee at the time when the assignment was made had no title to the property in question, and the subsequent transfer to him cannot acquire validity from the irregular meetings and resolutions of the Henderson companies on the 1st October. But for the position improperly taken by the assignee at a time when he had no basis for his claim, the goods would have been sold and the proceeds distributed, and he is, therefore, estopped from taking his present position. The goods have come to the assignee's hands subject to the lien and charge thereon granted to the execution creditors under the judgment of Latchford, J., which is not affected by sec. 14 of the Assignments and Preferences Act. That section cannot override the provisions of the Creditors' Relief Act as to interpleader, as otherwise the interpleading creditors would have no right even to the costs, for which special provision is made by 9 Edw. VII. ch. 48, sec. 6 (5). These interpleader sections of the Creditors' Relief Act, and Con. Rules 1120, 1121, and 1122, which deal with the same subject-matter, are not set aside and rendered nugatory by sec. 14 of the Assignments Act, even though the latter enactment is later in date: see Maxwell on Interpretation of Statutes, 4th ed., pp. 263-265, where it is laid down that "a general later law does not abrogate an earlier special one by mere implication." The following cases were referred to: *Reid v. Murphy* and *Clarkson v. Severs*, *supra*; *Wood v. Joselin* (1890), 18 A.R. 59, *per* Osler, J.A., at p. 61; *Farley v. Pedlar* (1901), 1 O.L.R. 570, 573; *Re Bank of Hamilton and Durrell*, 15 A.R. 500, at pp. 507, 508.

J. G. O'Donoghue, for the Queen City Foundry Co., referred to *In re Lake Superior Native Copper Co., Plummer's Case* (1885), 9 O.R. 277, at pp. 282, 283.

L. F. Heyd, K.C., for Gregson, referred to *Reid v. Gowans* (1886), 13 A.R. 501, 509.

R. J. MacLennan, for the Sheriff of Toronto.

Lefroy, in reply. *Re Bank of Hamilton and Durrell* is merely a case of construction of the Creditors' Relief Act, and has nothing to do with the Assignments Act. The costs incurred by the execu-

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tion creditors in contesting Atkinson's claim are secured to them in any event by sec. 6 (5) of the Creditors' Relief Act. Statements casting suspicion upon the motives of the creditor who is carrying on and bearing the costs of these proceedings should not be considered here. He is entitled to all the rights of the assignee, by whom his position is supported in every way. In answer to the argument of the respondents based upon the alleged defects in the deeds under which the assignee derives title, I refer to Elphinstone Norton and Clark on the Interpretation of Deeds, ed. of 1885, pp. 7, 8, where the principle is stated that all deeds relating to the same subject-matter, whether executed simultaneously or not, will be presumed to have been executed in that order which will enable the intent of the parties to be carried into effect.

November 21. **BOYD, C.**—The policy of the Legislature as to the levy of executions against a debtor's property is that there shall be a ratable distribution among all the creditors. The same policy as to ratable distribution is manifest, and is the intent of the Act, as to assignments for the benefit of creditors. Yet in both statutes preferences are given and priority of payment directed in cases where particular creditors have stepped forward to lay hold of property which has been alienated by the debtor in fraud of creditors. The Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 6, sub-sec. 2, so provides as to moneys realised by sale under an interpleader order. And a like provision is made for a creditor who undertakes litigation to recover property of the insolvent fraudulently transferred which the assignee for creditors will not undertake, being allowed to retain all he can recover: 10 Edw. VII. ch. 64, sec. 12. There are still privileged litigants, therefore, who may recover and hold for their own use as against the general body of creditors.

Such, I think, are the respondents in the present appeal. I agree with the result arrived at by my brother Middleton in his analysis of the growth and modifications of the statutes applicable to the rights of interpleading creditors who succeed in recovering property of their debtor assigned by him in fraud of their claims. Yet I desire briefly to express another view which commends itself to me.

These are the fundamental dates: the Henderson company

transferred its assets by bill of sale to Atkinson on the 2nd July, 1909. This was attacked by certain execution creditors, and an interpleader issue directed on the 10th May, 1910. This was determined adversely to the claim of Atkinson on the 30th September, 1910, by my brother Latchford, who by his judgment, in effect, declared that Atkinson held the goods subject to the executions against the Henderson company.

Next day preparations appear to have been made for a retransfer of the assets, but nothing was done save by some resolutions of the company in Canada and the company in the States.

On the 4th October the final order of interpleader was made. In that order it is set forth that the Sheriff, in lieu of selling the goods pursuant to the order of the 10th May, had, at the request of the claimant and the company, continued in possession pending the trial of the issue, and the Sheriff is then directed to sell the goods, and out of the proceeds of sale he is to pay the executions, costs and expenses—"the said creditors having a special lien therefor." That is the judicial utterance of the legislative lien or charge given to the successful litigant in interpleader proceedings.

Then comes the attempt to nullify the priority thus obtained by an assignment under the Assignments and Preferences Act, 10 Edw. VII. ch. 64, dated the 8th and 13th October. But it was admitted on the argument that the transfer of the goods held by Atkinson was not executed and that no title passed till after the 13th October and about two or three weeks before the argument (which was on the 17th November).

Nothing could then pass by the assignment to Martin for the body of creditors but a potential right to vacate, by proper means, the fraudulent transfer which had already been set aside as fraudulent as against the interpleading creditors. It would be absurd to go through that process again at the instance of the assignee, and the voluntary retransfer by the transferee Atkinson would not put the second assignee, Martin, in any better position, so far as regards the interpleading creditors. The assets had come to the hands of Martin charged with the statutory preferential lien, which operated distinctly on goods not then belonging to the Henderson Roller Bearings Company. The transfer of goods made by the company to Atkinson was good and valid as between them, and the title and property were out of the company altogether. The assignment to

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Martin did not give him title to these goods, but only a right to recover them or a right to receive them upon the voluntary transfer pending this appeal. But that did not displace the right of the interpleading creditors to look to the goods in the custody of the Sheriff to abide the result of the trial. The reasoning in *Murray v. Arnold* (1862), 3 B. & S. 287, is pertinent. The provisions of the Act as to insolvency do not compel us to say that all which was done on the interpleader issue was nugatory. The circumstances of this case, in my opinion, entirely withdraw it from the scope of the Act 10 Edw. VII. ch. 64, which applies to goods of the insolvent validly assigned to the assignee under that Act. The goods here were not those of the insolvent at the time of the assignment, and the assignee could not take a better title as against the interpleading creditors than Atkinson could give. Since writing this judgment I have read the case of *Galbraith v. Grimshaw*, [1910] A.C. 508, to which careful reference may be made.

MIDDLETON, J.:—The Creditors' Relief Act, as passed in 1880, contained no such provision as that now found in sec. 6, sub-secs. 4 and 5. The original Act simply provided for a ratable distribution of moneys levied under execution among all execution creditors.

In *Reid v. Gowans* (1886), 13 A.R. 501, an interpleader order had been made, and, in default of security being given by the claimant, the goods were sold by the Sheriff. Upon the trial of the issue the execution creditors succeeded. The question was whether the execution creditors who were parties to the issue with the claimant were entitled to any priority over creditors who had obtained executions after the initiation of the interpleader proceedings and who had not borne the risk and expense incident thereto. By an even division the Court of Appeal affirmed the order of a County Court Judge permitting all the creditors to share. This decision was in accord with the decision of the learned Master in Chambers, Mr. Dalton, in *Levy v. Davies* (1886), 12 P.R. 93. To remedy this, in 1887, the Legislature (50 Vict. ch. 8, schedule) enacted the provisions found as sec. 6, sub-secs. 4 and 5, in the revision of 1909. In the following year, and, so far as the reported decisions shew, without any interpretation of these clauses, the Act was again amended by 51 Vict. ch. 11, sec. 1, which provided that sec. 4 of the original Act (identical with sec. 4 of the present Act)

should apply to moneys received as the proceeds of a sale under an interpleader order, but, if the money is ordered to be paid into Court pending the trial of an interpleader issue, the entry to be made in the Sheriff's book—upon which distribution is to follow—shall not be made until the money is paid out of Court for distribution after the issue is disposed of. This section would seem to be in conflict with the earlier amendment.

These amendments came before the Court of Appeal in *Re Bank of Hamilton and Durrell* (1888), 15 A.R. 500, and the confusion resulting from these two amendments brought about an equally divided Court. There the Sheriff moved for an interpleader order. Upon the return of the motion the claimant was barred by the Judge before whom the matter was heard. The Court pointed out that the amendment in 1888 pointed to the trial of an issue upon an interpleader application.

In 1893 an attempt was made by the Legislature to remedy both these difficulties. By 56 Vict. ch. 5, sec. 12, 51 Vict. ch. 11, sec. 1, was repealed, and, in lieu thereof, it was provided that sec. 4 (1) and (2) of the R.S.O. 1887, ch. 65, the section providing for distribution among all creditors, should not apply to money realised upon the sale of property under an interpleader order, but, upon the determination of the interpleader issue in favour of the execution creditors, the money, whether in the Sheriff's hands or in Court, should be distributed among the creditors contesting the adverse claim. An adverse claim is, by sub-sec. 2, defined as a claim as to which an issue has been directed, and power is given to the Judge directing the issue to permit other creditors who may obtain executions to join in the contest on sharing the risk.

These provisions are carried without material change into the revision of 1897. So slowly, laboriously, and with many throes, has been expressed the will of the Legislature, and the right of the interpleading creditors now enmeshed in the provisions of the Act of 1909 is found to have its real origin in the amendment of 1893.

This right so conferred upon those by whose exertion the fund is made exigible must not be defeated by some other general provision, unless this can be said to be the will of the Legislature clearly expressed.

I think that the special provisions in favour of interpleading creditors may well be regarded as an exception to the general law

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regarding the ratable distribution of assets, either under the Creditors' Relief Act or under the Assignments Act.

The Legislature, in view of the division of opinion in the Court of Appeal upon the question whether goods when sold under an interpleader order were really sold under the execution, or whether when once an interpleader application was heard some new and independent jurisdiction attached, may well be assumed to have solved the question by this enactment, and can hardly be assumed to have intended merely to add another factor to a problem which had been found incapable of solution.

The same result is reached by another process of reasoning.

The sale to the American company was, as between the two concerns, valid. Atkinson's title as against the debtor was perfectly good. Certain creditors by the result of the interpleader have been declared entitled to take this property in Atkinson's hands to answer their executions, and these executions have so attached, and, in language not strictly accurate, may be said to have so become a lien upon the goods.

When the company assigned to Martin, they had no title whatever to the goods, and, apart from the statutory right to be mentioned, he acquired no greater right than his assignors had. He cannot take from these execution creditors the right to follow these goods into the hands of Atkinson, the fraudulent grantee. The right of preference given by sec. 14 is a right to take the goods of the debtor free from the claim of the execution creditors against such goods.

The assignee has also conferred upon him the statutory right, which the debtor could not give, of attacking transfers made by the debtor in fraud of creditors; but this does not enable him to take from creditors an advantage which they had already obtained, by an attack which had been carried on to completion and had resulted in a judgment in their favour carrying with it the right to exclude all creditors who had failed to come in and participate in the risk and expense.

If any point can be made of the fact that the sale directed by the interpleader order had, by consent of the creditors, and at the request of the claimant and debtors, been delayed till after the issue had been tried (I do not think it can), then the principle of *In re*

Lake Superior Native Copper Co., Plummer's Case, 9 O.R. 277, may well be applied.

The appeal fails and should be dismissed with costs.

LATCHFORD, J.:—I concur.

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Deed—Conveyance of Land in Fee Simple—Exception or Reservation—Construction—“Mines of Minerals”—“Springs of Oil”—Rock or Coal Oil—Natural Gas—Powers of Canada Company—Mining Powers—License—Right of Entry—Statutes of Limitations—Evidence—Trespass.

By deed of bargain and sale dated the 22nd January, 1867, the defendants the Canada Company conveyed to the plaintiff's predecessor in title land in the township of Tilbury East, in fee simple, “excepting and reserving to the said company, their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress, and regress, to and for the said company, their successors, lessees, licensees, and assigns, in order to search for, work, win, and carry away the same, and for these purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damage actually occasioned.” The grantee entered into possession and occupation of the land, and he and those claiming under him had since occupied and cultivated it. In December, 1905, the Canada Company granted a license to the other defendants (oil companies) to prospect and bore for mineral oil and natural gas upon the lands in question and other lands. In July, 1907, the oil companies obtained oil in the land next to that in question, and the Canada Company made a lease to the oil companies on the 3rd August, 1907, embracing all the mineral oil and natural gas, whether already discovered or not, lying or being in or under the lot, with liberty to enter, etc., and providing for a royalty to be paid to the Canada Company; and, pursuant thereto, the oil companies entered upon the plaintiff's land against his will and began to operate for oil and gas and to remove it. When the grant was made, in 1867, there was no oil issuing from the ground on this lot, and between 1867 and the 10th August, 1907, there was no entry on the land by the Canada Company, or those claiming under that company, for the purpose of searching or boring for oil or gas. The action was for the trespass begun on the 10th August, 1907, and subsequently continued:—

Held, that it was not open to the plaintiff, claiming under the grant of the Canada Company and having his *locus standi* in Court based thereon, to attack the exception and reservation in the deed as inconsistent with the powers of the company, and therefore null and void; and, further, that there was no inconsistency, as the purchaser had occupied, farmed, and cultivated the property for forty years, and the exercise of the mining rights did not destroy the *solum*; and it was proper for the company to reserve the mineral rights under the surface with a view of disposing of that part of what they possessed to the best advantage, and at the same time disposing of the surface rights for agricultural purposes.

Held, also, that this kind of subterranean property is not within the purview of the Statutes of Limitations, as the possession of the surface-owner is not adverse to or inconsistent with the possession in law of the subjacent proprietor.

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And *held*, that the language of the exception and reservation was to be construed according to its primary and natural signification, assisted by the light of co-existing circumstances, and also by oral or other testimony in the case of ambiguous or technical terms; and, so construing it, what was reserved consisted of "mines of minerals" and "springs of oil;" and, all that had been found of mineral character under the land being rock oil and petroleum gas, the oil came under the express reservation of "springs of oil in and under the land," but the gas did not come under the term "mines of minerals," not having been so regarded by the parties when the deed was executed in 1867; and, therefore, there was a valid reservation of all oil upon the lot, which was to be possessed and enjoyed by the oil companies, but there was no reservation of natural gas, which remained the property of the land-owner.

History of the development of the oil and gas fields of western Ontario as bearing upon the meaning of the reservation and its application to conditions existing at different periods.

THIS action was begun on the 25th September, 1907, by Alexander Farquharson, plaintiff, against the above-named company as sole defendants. In January, 1908, the Alexandra Oil and Development Company Limited and the Canada Company were added as defendants; in April, 1908, the original plaintiff died; and in September, 1908, an order was made allowing the action to be continued against the three companies in the name of Alexander Farquharson, administrator of the estate of Alexander Farquharson deceased, as plaintiff.

The plaintiff claimed: (a) damages for the wrongful entry of the defendants the two oil companies upon the south-east half of lot 6 in the 8th concession of the township of Tilbury East, in the county of Kent, and boring for oil thereon; (b) a declaration that the defendants the oil companies, as licensees or lessees of the defendants the Canada Company, had no right, title, or interest in the lands; (c) an injunction restraining the oil companies, their servants and agents, from further interference with the plaintiff's possession; (d) an order that the license and lease of the Canada Company to their co-defendants be cancelled and removed from the register of deeds as clouds on the plaintiff's title; (e) an account of the defendants' dealings with the plaintiff's property; (f) further or other relief; and (g) costs.

The following admissions were made by all parties to the action:—

1. The Canada Company were incorporated by a charter granted on the 19th August, 1826, pursuant to an Act of the Imperial Parliament, 6 Geo. IV. ch. 75, intituled "An Act to enable His Majesty to grant to a Company, to be incorporated by Charter, to

be called 'The Canada Company,' certain Lands in the Province of Upper Canada, and to invest the said Company with certain Powers and Privileges, 'and for other Purposes relating thereto.'

2. The Acts of Parliament relating to the Canada Company which have a bearing upon this case are: 6 Geo. IV. ch. 75 (Imp.); 9 Geo. IV. ch. 51 (Imp.); 27 & 28 Vict. ch. 100 (Province of Canada); and 36 Vict. ch. 125 (Province of Ontario).

3. The Canada Company received from the Crown, by various grants, large tracts of land in Canada, amounting in all to about 2,500,000 acres, in what is now the Province of Ontario, in consideration of the sums of money from time to time paid as the price of such land.

4. By patent issued by the Province of Canada and dated the 12th October, 1841, the Crown did give and grant to the Canada Company 192,416 acres of land situate in what is now the Province of Ontario, for the consideration paid by the Canada Company to the Province of Canada of £33,672 16s. 0d., being at the rate of 3s. 6d. per acre, which said grant of land included, among other lands, lot 6 in the 8th concession of Tilbury East, under the reservations, limitations, and conditions in the patent expressed, and the patent was duly registered in the registry office for the county of Kent; and by release dated the 29th July, 1847, Her Majesty the Queen released and discharged the Canada Company in respect of certain matters and things therein mentioned, to which release, it is agreed, all parties shall be at liberty to refer on the hearing.

5. By deed of bargain and sale dated the 22nd January, 1867, and registered in the registry office for the county of Kent on the 19th March, 1867, the Canada Company, for the consideration of £112 10s. 0d., did grant and release to one Charles Farquharson . . . , his heirs and assigns, . . . the south half of lot 6 in the 8th concession of the aforesaid township of Tilbury East, containing . . . 100 acres of land . . . and all the right, title, and interest of the Canada Company to and in the same and every part thereof, excepting and reserving to the said company, their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress, and regress, to and for the said company, their successors, lessees, licensees, and assigns, in order to search for, work, win,

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and carry away the same, and for these purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damage actually occasioned.

6. By deed of bargain and sale dated the 12th March, 1887, and registered on the 1st August, 1887, . . . Charles Farquharson purported to convey unto one Donald R. Farquharson, his heirs and assigns, forever, the said lands.

7. By deed of bargain and sale dated the 1st January, 1902, and registered . . . on the 12th April, 1902, the said Donald R. Farquharson purported to convey to Alexander Farquharson (the plaintiff by original action), his heirs and assigns, forever, the said lands.

8. Alexander Farquharson died on the 1st April, 1908, and Alexander Farquharson (the plaintiff) has been duly appointed administrator of the estate of the . . . deceased.

9. Charles Farquharson purchased the said land from the Canada Company with the exception and reservation contained in the said deed from the Canada Company to him, and he accepted the said deed and registered the same as aforesaid, and duly entered into possession and occupation of the said land thereunder, and he and his successors in title occupied and cultivated the said land up to the time of the alleged trespass, but did not at any time search for, win, or carry away metals, minerals, or oil in or under the said lands.

10. By license dated the 14th December, 1905, the Canada Company did grant a license of the said land, among other lands, to the Alexandra Oil and Development Company Limited, to prospect and bore for mineral oil and natural gas, upon the terms in the said license more particularly set forth.

11. Under and by virtue of an agreement dated the 1st August, 1906, and duly registered . . . , and made between the Alexandra Oil and Development Company Limited, . . . of the first part, Philip W. Roth (and other persons named), of the second part, and Luther S. Church . . . William L. Norton . . . and Nolan H. Bowlby . . . , of the third part, the said Alexandra Oil and Development Company Limited did assign, transfer, and set over unto the parties of the second part an undivided one-fourth interest and to the parties of the third

part an undivided one-fourth interest in and to the said license and oil rights thereby secured, upon the terms and conditions therein set forth.

12. It was provided by the said agreement that, in the event of gas or oil being found on the said land, the lease or leases to be issued by the Canada Company pursuant to the said license should be issued in the name of the Alexandra Oil and Development Company Limited, to be held by them subject to the terms and conditions of the said agreement.

13. By agreement dated the 20th September, 1906, the said Nolan H. Bowlby transferred to the said Philip W. Roth (and the other parties of the second part) all his undivided one-twelfth interest in and to the said license and the oil rights thereby secured.

14. Under and by virtue of an indenture dated the 7th November, 1906, the said Philip W. Roth (and the others named) transferred and set over unto the defendants the Barnard Argue Roth Stearns Oil and Gas Company Limited all their estate, right, title, interest, claim, and demand in and to the said license and the land and premises covered thereby and all benefits to be derived therefrom.

15. Under and by virtue of an instrument dated the 6th February, 1907, the said Luther S. Church transferred and set over to the same defendants (Barnard, etc., Company) his undivided one-twelfth interest.

16. Under and by virtue of an indenture dated the 6th February, 1907, the said William L. Norton assigned, transferred, and set over to the same defendants his undivided one-twelfth interest.

17. In the latter part of July, 1907, the said defendants and the defendants the Alexandra Oil and Development Company obtained oil on the north-west half of lot 6 in the 8th concession of Tilbury East, being the north-west half of the lot of which the land in question herein forms the south-east half, and immediately applied to the Canada Company for the issue to the Alexandra Oil and Development Company of a grant and lease of the whole of lot 6, and the Canada Company did, by instrument dated the 3rd August, 1907, and registered . . . grant and lease to the Alexandra Oil and Development Company Limited all the mineral oil and natural gas, whether already discovered or not, lying and being in or under lot 6, together with the liberty of ingress, egress,

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and regress, to search for, work, win, and carry away the same for their own use and benefit, subject to the reservation and conditions therein provided, upon the terms and for the rent therein mentioned, including the payment to the Canada Company, their successors and assigns, of a royalty of one-eighth of all the oil produced and saved or taken from the lands; and on or about the 10th August, 1907, the defendants other than the Canada Company, without the consent or acquiescence of the plaintiff by original action, entered upon the south-east half of lot 6, the plaintiff by original action being then in possession of the same as grantee as aforesaid, and commenced to operate for oil and natural gas thereon and to remove the same therefrom, and are still engaged in winning and carrying away oil and gas therefrom.

18. At the time of the deed to Charles Farquharson there was no oil issuing from the ground on the property in question, and between the date of the said deed and the 10th August, 1907, the defendants the Canada Company did not, nor did any one claiming under them, enter on the said land for the purpose of searching for or boring for oil or gas, and the first drilling or mining of any kind done on the said land by any one was on the said 10th day of August, 1907.

19. The defendants the Barnard Argue Roth Stearns Oil and Gas Company Limited and the Alexandra Oil and Development Company Limited are companies duly incorporated under the laws of the Province of Ontario by letters patent issued under the terms of the Ontario Companies Act and the Ontario Mining Companies Incorporation Act, and are authorised by their respective charters to prospect, drill, and operate for petroleum, gas, and oil, and to sell and deal in the same.

April 8 and November 3 and 4. Upon the above admissions and upon documents produced and oral testimony taken (referred to in the judgment), the action was tried before Boyd, C., without a jury, at Toronto.

C. H. Ritchie, K.C., and *Thomas Scullard*, for the plaintiff.

I. F. Hellmuth, K.C., for the defendants the Canada Company.

M. Wilson, K.C., and *J. F. Edgar*, for the other defendants.

November 23. BOYD, C.:—This is a test case to determine, as between the Canada Company and the purchasers from that com-

pany, what rights were reserved under a standard form of conveyance adopted by the company in disposing of lands in the oil region of Western Ontario. A typical instance has been selected, in which the purchaser was Charles Farquharson (now dead and represented by the plaintiff), and the lands being the south-east half of lot 6 in the 8th concession of Tilbury East (100 acres), in the county of Kent. By deed of bargain and sale dated the 22nd January, 1867, and at the price of £112 10s. 0d., this was conveyed in fee simple, with the reservation expressed and punctuated as follows: "Excepting and reserving to the said company . . . all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress," etc., to the said company to search for, work, win, and carry away the same, and for these purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damage actually occasioned.

By admissions it appears that the purchaser entered into possession and occupation, and he and those claiming under him have since occupied and cultivated the land.

In December, 1905, the Canada Company granted a license to the Alexandra Oil and Development Company, conferring power to prospect and bore for mineral oil and natural gas upon the land in question and other adjoining lands. By the terms of the agreement it was provided that, in the event of oil or gas being found on the premises, a lease was to be issued by the Canada Company to the oil company or to those claiming under the last-named company.

In the latter part of July, 1907, the oil company obtained oil in the north-west half of lot 6 in the 8th concession of Tilbury (being the north-west half of the lot of which the land in question forms the south-east half), and thereupon the Canada Company leased the whole of lot 6 to the oil company on the 3rd August, 1907, embracing all the mineral oil and natural gas, whether already discovered or not, lying or being in or under the lot, with liberty to enter, etc., and providing for a royalty to be paid to the Canada Company; and, pursuant thereto, the defendants entered upon the plaintiff's land against his will and began to operate for oil and gas and to remove the same therefrom. This alleged trespass

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began on the 10th August, 1907, and subsequently continued, forming the present cause of action.

When the grant was made to Farquharson in 1867, there was no oil issuing from the ground on this lot, and between 1867 and the 10th August, 1907, there was no entry on the land by the Canada Company, or those claiming under that company, for the purpose of searching or boring for oil or gas—and the first drilling or mining of any kind done on the land was on the said 10th August, 1907. This closes the list of material facts admitted.

Some issues were raised and disposed of during the argument, and I now adhere to those rulings.

The first was that, as the Canada Company obtained its charter for the expressed purpose of purchasing, holding, improving, clearing, settling, and disposing of waste and other lands in the Province of Upper Canada (granted in October, 1841), the company was not empowered to engage in the business of searching for, winning and carrying away, selling or trafficking in minerals, and that the exception and reservation contained in the Farquharson deed was inconsistent with the powers of the company, and is therefore null and void.

I thought it was not open to the purchaser, claiming under the grant of the company and having his *locus standi* in Court based thereon, to make this direct attack, whatever might be the rights of the Crown to intervene. But I thought, further, that there was no inconsistency, as the purchaser had occupied, farmed, and cultivated the property without molestation for forty years, and that the exercise of the mining rights did not destroy the *solum*, though it might somewhat impair the value—a consequence provided for by compensation. It also appeared to me proper enough for the company to reserve the mineral rights under the surface with a view of disposing of that part of what the company possessed to the best advantage, and at the same time disposing of the surface rights for agricultural purposes.

The record also raises the question of the right to enter for mineral exploration and excavation being barred by the Statutes of Limitations, but I regard this kind of subterranean property as not within the purview of those statutes, as the possession of the surface-owner is not adverse to or inconsistent with the possession in law of the subjacent proprietor. See *Hodgkinson v. Fletcher* (1781), 3 Douglas 31.

This clears the way to deal with the matters more strenuously argued, viz.: (1) whether the defendants have any right to deal with oil not exposed in surface springs and to go below in search of it; and (2) whether the defendants have any right or claim in respect to natural gas.

This falls to be determined by the ascertainment of the real meaning of the language used in the reservation and exception, as understood by the parties at the time. The language is to be construed according to its primary and natural signification, assisted by the light of co-existing circumstances, and also by oral or other testimony in the case of ambiguous or technical terms.

The punctuation in the printed form of deed is not to be neglected. It may be indicated thus:—

<p>“All mines and quarries of metals and minerals,”</p> <p>“And all springs of oil in and under the said land,”</p>	}	<p>“whether already discovered or not.”</p>
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The first clause may be abbreviated to “all mines of minerals.” And the two kinds of things reserved are: (1) all mines of minerals; and (2) all springs of oil. These “springs of oil,” however, are expressed to be “in and under the land.” Mines of minerals would *per se* imply that they were under the surface and to be got at by discovery or search before being worked or carried away. The same right of discovery and search, etc., would seem to apply also to the “springs of oil.”

The parties manifestly intended to reserve something—what they did reserve is expressed by “mines of minerals” and “springs of oil.”

And now the difficulty confronts us, what is meant by “mines of minerals” and by “springs of oil”? All that has been found of mineral character under the land (so far as the evidence shews) is the rock oil and petroleum gas.

At the outset, I am impressed with the feeling that the case is of doubt and difficulty, and that different minds may well come to different conclusions. The whole law relating to mineral reservations has been involved in confusion and contradiction. It is not encouraging to learn from an author of eminence that it is now impossible to tell for certain what the word “minerals” in its legal sense really means: MacSwinney on Mines, 3rd ed. (1907), p. 10.

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The latest definition is to be found in Lord Halsbury's *Laws of England*, vol. 3, p. 177 (1908): "'Minerals' comprise all substances lying in the strata of the land which are commonly worked for profit and have a value independent of the surface."

However, for this case it is safe to begin with what Lord Watson says: "'Mines' and 'minerals' are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used:" *Lord Provost and Magistrates of Glasgow v. Farie* (1888), 13 App. Cas. 657, at p. 675.

As to "mines," what is said in the *Encyc. of the Laws of England*, 2nd ed. (1908), may be accepted as correct: "Speaking generally, a 'mine' may be defined to be 'an excavation in the earth which yields minerals:'" vol. 9, p. 237. "If the article sought for is obtained by underground workings, the place from which it is obtained is a mine; if it is obtained by surface workings, the place is a quarry:" *ib.*, p. 237.

The combination "mines of minerals" has been considered by Lord Herschell in *Midland R.W. Co. v. Robinson* (1889), 15 App. Cas. 19, 26, 27, where he makes plain what he had said as to its scope in the earlier case in 13 App. Cas., and gives substantially the definition accepted by Lord Halsbury which I have quoted. The point of his correction is that scattered pieces of mineral lying under are not to be so called, "but only mineral substances lying in seams, or beds, or strata."

There is no doubt that these extensive beds or chambers containing rock oil and natural gas may be regarded as "mines of minerals" in the comprehensive sense of that term.

A well-marked division is to be noted in the commercial development of the western oil fields of Ontario which is of importance in considering the meaning of the reservation. All agree that public attention was directed to the utilisation of oil products in the early sixties. About 1861 or 1862 is fixed by Mr. Coste as the time when work began at the village called Oil Springs (Lambton county), where some small springs were at first utilised as a lubricant, and afterwards the process of drilling or boring began, by which larger quantities were reached and turned to profitable use from oil wells at that place. In the county of Kent, at Bothwell, excitement arose on account of oil and gas being seen on the surface about 1865, and boring operations soon followed for oil.

From the correspondence of the Canada Company in March, 1866, it appears that the chief scene of operations for oil was in the township of Enniskillen (county of Lambton) and at Oil Springs and Petrolia (about twenty miles distant); but it proceeds, "the excitement is rapidly extending to other localities."

It is also proved by the present Chief Commissioner that oil and mining leases first began to be made by the Canada Company defendants in October, 1863.

The next development in the oil region was in regard to natural gas: one witness says that gas first became economically valuable in 1880 (W. H. Drew). But, upon the evidence, the first well was drilled in the Essex field in 1889, though the gas was not piped nor used for two or three years later. By experience of working for oil in the former period it was observed that there was always some gas where oil was found, but that gas might be found without the presence of oil. I think Mr. Coste's evidence may well be received as shewing that, though gas was found before, it did not begin to be utilised in any commercial sense till 1890, and since then there has been a steady increase in the output, so that now the financial return from gas exceeds by (say) five times that derived from oil. The early use of the gas which accompanied to a greater or lesser extent the explorations and workings for oil was for trivial and local purposes, *e.g.*, lighting the camps by means of torches or cooking in small stoves. But even this in a very limited way, for the people did not know how to reduce pressure, so as to handle it with any degree of safety. It was generally regarded as a dangerous and destructive element, not to be made serviceable as a commodity, but to be evaded and gotten rid of. A graphic instance of this is given in a letter written by W. B. Robinson, Chief Commissioner of the company in Canada, to the head office in London, dated the 24th March, 1866. At Lyndoch, in the township of Walsingham (county of Norfolk), at an oil well, workmen were nearly blinded by the escape of gas, and they arranged a sort of fan connected with the engine whereby the gas was driven through a pipe and conducted to the outside of the building, and so set free to escape. Therefore, it may be taken as well-established that oil came into public notice and use as a valuable commodity in the early sixties, and that it was not till the early nineties (at least in this country)

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that natural gas was also generally recognised as a valuable commodity. The change is practically marked by the change in the conveyances of the Canada Company. The first form of lease (1863) had the reservation thus expressed, "all or any of the mines minerals and mineral oils in under or upon the said premises." After the decision of the *Gosfield* case, the defendants the Canada Company changed the form of reservation so as in terms to cover "natural gas," in addition to "oil." That decision was first made by Mr. Justice Street in May, 1890, and affirmed in appeal in November, 1891: *In re Ontario Natural Gas Co. and Township of Gosfield South*, 19 O.R. 591, 18 A.R. 626. It decided that natural gas was a "mineral," as that word was used in the Municipal Act. The revised form of reservation then made by the company reads, "reserving all or any of the mines minerals mineral oils and natural gas on in or under the said lands."

The first mining lease granted by the company to one Tribble in 1863 was of land in the township of Chatham, county of Kent.

This land under consideration was also in the county of Kent and township of Tilbury East. The adjoining township of Tilbury West is in the county of Essex.

The whole Tilbury field has special characteristics pointed out by Mr. Coste. In the north and north-east part oil and gas are found pretty much together, but not much gas. In the south part of the field (along the lake) gas predominates, with very little oil. The lot in question is situate on about the dividing line between the two; and on the lot are at present some gas wells and some oil wells, and in other wells more gas than there is oil. Generally in the Tilbury field the output of gas is a great deal larger than the output of oil. It is true that there are separate wells distinctively of gas and distinctively of oil. But, even when oil and gas are found in the same deposit or stratum, it is practicable and profitable to extract them separately or save them separately, if either product is found in paying quantities. There are wells containing so little gas or so little oil that the minimum product may be rejected in estimating the character of the well. Again, gas may run out in a well, and it may become an oil well. It is admitted that in one well on this land the defendants have taken up both gas and oil and have carried away and sold both products.

Following the evidence, the *modus operandi* in this field as now carried on may be thus briefly described. The surface crust of over 100 feet is to be gone through; then comes impervious rock to be drilled through to a greater or lesser depth before oil or gas-bearing chambers are reached. Underlying this covering, porous rock or "pay streaks" are found containing the object of search. In the case of oil predominating, explosives are used to form a cavity and accelerate the flow of oil which is pumped up to the surface. That chamber being drained or exhausted, the drill is again applied to the stratum of impervious rock underneath and another "pay streak" struck; and so on by alternate drilling and pumping till primitive foundations are reached.

In the first life of a new field and for some time thereafter the common experience is that the gas pressure is strong enough to eject the oil. There is always an uplift of oil, which diminishes as the gas is spent. Gas is always found in new wells with an average upward pressure of 600 lbs. to the square inch. Pumping is resorted to when the gas is exhausted.

The evidence given before me justifies the adoption of the excellent description of operating given in the judgment of *Wettengel v. Gormley* (1894), 160 Pa. St. 559, at p. 567: "It is well understood among oil operators that the fluid is found deposited in a porous sand-rock, at a distance ranging from 500 to 3,000 feet below the surface. This rock is saturated throughout its extent with oil, and when the hard stratum overlying it is pierced by the drill the oil and gas find vent, and are forced, by the pressure to which they are subject, into and through the well to the surface. After this pressure is relieved by the outflow the wells become less active. The movement of the oil in the sand-rock grows sluggish, and it becomes necessary to pump the wells in order both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on the subject is not at present attainable (1894), but the vagrant character of the mineral and the porous sand-rock in which it is found, and through which it moves, fully justify the general conclusion . . . and have led to its general adoption by practical operators."

In the first stage of exploiting the petroleum fields, oil was the

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primary and, indeed, the sole object of search, and the gas with which it was charged was a negligible concomitant. The gas when liberated became the expansive power which raised the oil up to or towards the surface, and, having rendered that service, it was disregarded as undesirable and unmanageable.

That the Canada Company had given great consideration to the subject of oil in their lands in Western Ontario is shewn by the long letter, already referred to, written by the then Chief Commissioner to the London Board of Governors, of date the 24th March, 1866. I extract some pertinent passages:—

“As we have frequently stated, neither past experience nor any scientific knowledge which has been brought to bear upon the subject has furnished any reliable data to guide parties in the search for oil, and no one can tell beforehand where a profitable vein may or may not be struck except by actual testing. . . .”

“Upon the whole, we incline to the system of selling for cash with the reservation as possessing perhaps the greatest advantage, but we know that we shall find increasing difficulty in disposing of our lots in this way, as buyers for cash do not like to invest largely in the purchase of lands clogged with a charge which renders them less saleable and easy of transfer. . . .”

“In all leases which we grant now for lands where there is the slightest probability of oil being found we insert the oil clause reservation as a matter of precaution.”

The condition of affairs in the new field of Tilbury can now be better appreciated when the purchase was made in 1867.

No explanation is offered in the evidence or otherwise to shew why the words of reservation were changed from “mineral oils,” which appear in the earlier form of 1863 and the later one of 1891, to “springs of oil in and under the said land.” I should say that local conditions suggested the change. There was no oil visible on the face of the land, but there was a strong probability that sooner or later it would be found below. The only way to find it was to discover it by boring or drilling. The reservation provides for underground working; liberty is given to search for undiscovered springs underground, “to work, win and carry away the same.” The words are apt words for “mining operations,” to which the oil-workings are akin. The springs of oil are “won” when they are put in a state in which continuous work-

ing can go forward in the ordinary way: *per* Hatherley, L.C., in *Lewis v. Fothergill* (1869), L.R. 5 Ch. 111; and James, L.J., in *Lord Rokeby v. Elliot* (1879), 13 Ch. D. 277, at p. 279.

It is a well-known fact that the first suggestion as to the best method of securing the oil came from the process used in opening artesian wells (Thornton, Oil and Gas, p. 10). Hence the derrick and its adjustments are found upon the Canadian fields. In the company's letter already quoted it is said, "Wells and derricks everywhere meet the eye." The similarity between the behaviour of springs of underground water and of the rock oil charged with gas stored in subterranean reservoirs was patent to all observers. Both, when the covering is pierced, are wont to rise up and flow forth. "Spring," "well," "fountain," "source," are synonymous words. "Spring" is correctly used to denote the natural source of water supply, and "well" to indicate the manner in which the supply has been made available. It is of common use to say "a well of spring water," *i.e.*, water drawn from a spring rising in a well. In a very early record we find, "And Isaac's servants digged in the valley of Gerar and found there a well of springing water" (Gen. xxvi. 19). Of these modern seekers it may also be said, "And they drilled in the petroleum field and found there wells of springing oil." In mining parlance the drill hole forms the "well," into which the underground oil rises, propelled by the expansion of the gas, and so the well is filled from the oil springs below. Taking the context as to discovery and searching, I would read the reservation as meaning that artificial work was permitted in order to reach the natural supply of fluid, which is called "springs of oil." In brief, the word "springs" is to be understood as "sources."

This rising or springing of the oil in the early history of the enterprise was the specially remarkable thing that everybody noticed. This movement of the oil when first tapped may be called in every sense of the word its salient feature. It was one of the "sights" of the country, and it was noised abroad far and wide.

In the appendix to Tomlinson's Cyclopædia of Useful Arts, vol. 3 (1866), it is said, at p. 495, under title "Naphtha:" "The chief source of supply a few years ago from the oil wells of Ran-
goon have now sunk into significance as compared with the enor-

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mous yield of the recently-discovered oil-wells of Canada and North America. In a commercial point of view they are discoveries. . . . The Canada wells give large supplies. . . . In a few of the Canadian wells the oil gushes up and rises several feet above the ground; but in most cases the fluid requires to be pumped up. . . . When first discovered the oil wells of Enniskillen yielded a remarkably abundant supply, but this has gradually fallen off . . . these wells ceased to flow in the order of their depth . . . the shallowest have continued for the longest time. It is said that the wells gave no indications of the approaching stoppage of the oil, the flow being abundant up to the last moment, and saline water taking the place of the oil when it ceased."

Another contemporaneous record is found in the "New Edition" of Brande and Cox's Dictionary of Science, published in 1866, at p. 710: "This artificial mineral oil has recently encountered a formidable rival in native coal oil or rock oil, which has been distilled by nature herself. . . . These discoveries have been made principally in the United States of America, and more especially in Canada. In the latter country, no less than twenty million gallons of this oil have been obtained from wells, several of which are spouting wells. From these the oil rises, probably from the pressure of gas, to a considerable height above the surface of the ground, so as not to require pumping."

The plaintiff's contention is that the oil obtained by the defendants was not obtained from "springs of oil," and, in effect, that there were and are no springs of oil on the land. Mr. Coste's evidence is directed to this: "A spring of oil," he testifies, "flows naturally from the surface; if a hole is put in the ground, and the oil flows, I would call that a flowing well, and not a spring: a spring is the operation of nature, while the other is produced by work." That limitation of meaning would, in effect, completely eviscerate the reservation of all substantial import. It leaves out any consideration of the context as to discovering and as to the springs being under the land. The reservation points to subterranean springs which could only be utilised by being pierced. The artificial work is necessary in order to get at the sources of all the wells and springs of oil which are under the land. All the successive underlying reservoirs of oil are open for discovery and

winning; all have in the remote past been so placed by internal forces pressing upward; all are "springs" by the nature of their formation; and all ready to respond by issuing forth towards the surface when the drill completes its work.

This land with the reservation was sold at a lower price than usual on account of this "clog." That being so, the Court should lean against any construction which would give the purchaser more than he bargained for—that is, any construction consistent with the fair import of the language. Again, it is true that by the grant in fee simple the entire proprietary right to the land and everything above and below is conveyed to the grantee. It is for the grantor to make plain how much of the interior is taken out of the grant by the reservation. The language of a Scottish Judge is accepted by the House of Lords, that an exception is to be construed strictly and not extended beyond what the words of exception clearly cover: *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116, at p. 126.

Granted that "rock oil" and "natural gas" may be classed as minerals, are they or is either of them reserved or excepted?

While the scientific world is of disputatious mood as to the ultimate origin (*i.e.*, the genesis) of petroleum, there is a general consensus that its two valuable products, gas and oil, are compounds in different proportions of hydro-carbon—that each is a distinctive mineral of peculiar character, and, when found in sufficient bulk, may be properly spoken of as "mines of minerals." That is but one step in the inquiry, although it has been deemed sufficient in some reported decisions. But many of the older cases have had their foundations shaken by the deliverance of the House of Lords in a recent case, already alluded to, of *North British R.W. Co. v. Budhill Coal and Sandstone Co.*, [1910] A.C. 116, a Scottish appeal, but which lays down principles of general application. That case discloses an agreement among all the Law Lords that the determination of the meaning of the words "mines and minerals" is a question of fact. That is to say, one is to find what these words mean in the ordinary sense in which they are understood and used by land-owners and those engaged in mining and commerce. To this may be added (when the question is in a conveyance *inter partes*), what was the understanding and intention of the parties at the time of the transaction? The outcome

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of the Scottish appeal is to confirm the opinion expressed as to the best method of inquiry by James, L.J., in *Hext v. Gill* (1872), L.R. 7 Ch. 699, at p. 719, which was also advocated as the proper method by Mr. MacSwinney in his discussion of the decisions at pp. 16, 17, of his book on Mines published in 1907.

Hence the present case will turn, not on the chemical or mineralogical signification of the terms used in the reservation, but on the meaning of them at the time, as used by ordinary persons concerned with the subject, and especially as to the meaning understood and accepted by the parties. A short reference may be made to the testimony of various witnesses called, representing farmers, business men, and mining engineers, with, I think, no dissentient voice. Mr. Fleming, the treasurer of Chatham, says that, as commonly understood in that district, "mineral" was a hard substance, and not fluid or gaseous. His memory goes back to 1865. Natural gas, he says, was discovered after the oil work had been prosecuted, and nothing was known of it in 1867 as commercially valuable. Mr. Gardner, brought up on a farm and engaged formerly in financial business (whose memory goes back to the oil excitement), says "mineral" was something in metal form, and not oil as a general idea. Mr. Mickle, mining engineer and mining assessor for the Province of Ontario, says that "mineral" in ordinary parlance did not include a fluid (such as oil or gas), but was confined to minerals of metallic appearance. Mr. Drew, who had been a practical miner in oil, says that in 1867 "mineral" would not include gas or oil, but is understood to cover some hard substance. Mr. Hays, a technical chemist, says that ordinary men would not regard a fluid as a mineral, nor might he regard gas as a mineral.

Having recourse to dictionaries, it may suffice to quote from Dr. Murray's Oxford Dictionary the first meaning given to the word "mine"—"An excavation made in the earth for the purpose of digging out metals or metallic ore or certain other minerals, as coal, slate, precious stones." And so as to "mineral," his first definition is: "Any substance which is obtained by mining: a product of the bowels of the earth."

In *Lord Provost and Magistrates of Glasgow v. Farie*, 13 App. Cas. 657, Lord Herschell notes the extensive scope of the word "minerals" thus: "In its widest signification it probably means

every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life:" p. 689. While at p. 683 he says: "I think the popular use of the word is often narrower, and that when people talk of minerals they frequently use the word in reference to metals or metalliferous ores."

The evidence in this case leads to the conclusion that neither oil nor gas in the petroleum beds was regarded as a mineral by the parties when the deed was executed in 1867.

To scientists gas and oil possess peculiar properties distinguishing them from ordinary minerals of solid composition. To the common observer, likewise, they have notable conspicuous differences from metals and metalliferous substances. One is fluid and the other is gaseous, and neither will remain *in situ* if there is an opportunity to escape. They resemble water in this, that they will, under pressure, rise and flow and spread, and may be drawn away from one well to another miles off. They are fugacious and vagrant things, and one of them (gas) was not supposed to be of any value when the deed was made. The commercial importance of the one product was appreciated before the conveyance—not so as to the other for about twenty-five years thereafter. The one thing emphasised in the contract is as to the "springs of oil," and by the very terms of the instrument that was not regarded as embraced under the general words as to mines, minerals, and quarries. The other product, now so valuable and important, was passed over unnoticed, because it was unknown (in any valuable or commercial sense). It was not in the contemplation of either party, so it passed under the grant of the land to the purchaser.

The conclusion of the whole matter is that, in my opinion, there is a valid reservation of all oil upon the lot, which is to be possessed and enjoyed by the defendants, but that there is no reservation of natural gas, which remains the property of the land-owner.

There is no legal difficulty in allocating the different strata bearing gas and oil to different owners—no difficulty in making the legal distinction of ownership as to gas and oil in the same well. With this limitation, however, that where the well is distinctively an oil well, and the amount of gas merely a subsidiary concomitant, the gas element should be disregarded and the whole go under the

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reservation. And the like limitation as to a distinctively gas well—where the clear preponderance of gas should carry the whole well to the owner. There may be cases of mixed gas and oil, where each has a commercial value and may be profitably worked by separate adjustments, as indicated in the evidence: in which cases it may be that mutual concessions will have to be made by the co-owners in order to the economic utilisation of the joint products. But this and other details, I understood, would be subject to the arrangement between the parties, if once the respective rights were judicially determined.

It may not be amiss to repeat here what was said in another case when mining and surface owners were at variance: "The parties may find it to be to their mutual advantage to come to terms upon some fair workable system; remembering a suggestion that, in a case of conflicting interests, it is better to have a *modus vivendi* than to be in a continual attitude of *qui vive*:" *Coniagas Mines Limited v. Town of Cobalt* (1909), 20 O.L.R. 622, 632.

The defendants the mining parties should account for the net profits made for all gas obtained from this lot, and the Canada Company for all royalties from this source.

Success being divided, instead of an apportionment of costs, it is simpler to follow the usual plan of giving no costs to either side.

I have referred to the American cases cited and have referred to many others arising in the oil-producing States. Those from which I have derived most assistance are decisions very much in line with the method pursued in the *Budhill* case, viz.: *Dunham v. Kirkpatrick* (1882), 101 Pa. St. 36, followed in 1906 by *Silver v. Bush* (1906), 213 Pa. St. 195, and again followed in a still later case, *McKinney's Heirs v. Central Kentucky Natural Gas Co.* (1909), 134 Ky. 239; and a fourth from Michigan, *Deer Lake Co. v. Michigan Land and Iron Co.* (1891), 89 Mich. 180; also *Westmoreland Natural Gas Co. v. DeWitt* (1889), 130 Pa. St. 235; *Burton v. Forest Oil Co.* (1903), 54 Atl. R. 266; *Ohio Oil Co. v. Indiana* (1899), 177 U.S. 190; *Wagner v. Mallory* (1902), 169 N.Y. 501.

The case cited for the defendants of *Murray v. Allred* (1897), 100 Tenn. 100, is opposed to the weight of authority following *Dunham v. Kirkpatrick*.

[MEREDITH, C.J.C.P.]

NORTHERN CROWN BANK V. INTERNATIONAL ELECTRIC CO.

1910

Promissory Note—Instrument Payable on Demand—Negotiation on Day of Date—"Overdue" Note—Bills of Exchange Act, secs. 70, 182.

Nov. 26.

A promissory note payable on demand was indorsed to the plaintiffs on the day it bore date:—

Held, that it was not overdue when negotiated so as to affect the plaintiffs as holders with defects of title of which they had no notice.

Sections 70 and 182 of the Bills of Exchange Act considered.

In re George (1890), 44 Ch.D. 627, and *Edwards v. Walters*, [1896] 2 Ch. 157, distinguished.

ACTION upon a promissory note.

October 17. The action was tried before MEREDITH, C.J.C.P., without a jury, at Toronto.

F. Arnoldi, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., for the defendants.

November 26. MEREDITH, C.J.:—The plaintiffs sue to recover the amount of a promissory note for \$3,500, dated the 28th June, 1906, made by the defendant company, payable to the order of the Electric Advertising Company, with interest at five per cent. per annum "before and after due and until paid," which was indorsed to the plaintiffs on the day it bears date.

The defence is that the note was made without consideration; that it was negotiated by the payees in fraud of the defendants; and that, being payable on demand, it was overdue when the plaintiffs became the holders of it; and that they, therefore, took it subject to any defect of title affecting it at maturity.

The learned counsel for the defendants, in support of his contention that the promissory note was overdue when it was indorsed to the plaintiffs, relied on *In re George* (1890), 44 Ch.D. 627, and *Edwards v. Walters*, [1896] 2 Ch. 157, which establish that a promissory note payable on demand is at maturity immediately upon its being made, and treat that as settled by authority.

The question in each of these cases was as to whether there had been an effective renunciation by the holder of a promissory note, within the meaning of sec. 62 of the English Bills of Exchange Act, which provides, as does sec. 142 (sub-secs. 1 and 3) of the Canadian

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Act, that "when the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor."

It was argued by the learned counsel that if, as appears to be the law, a promissory note payable on demand is at maturity immediately upon its being made, the promissory note sued on was overdue when it passed into the hands of the plaintiffs, and they therefore took it subject to any defect of title affecting it at maturity.

It was further argued that the language of sec. 182 of the Canadian Act shews that it was framed on the hypothesis that this was the law, and that the purpose of the section was to create an exception to the general rule, limited in its operation to the particular matter with which the section deals. Section 182 reads as follows: "182. Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue."

In my opinion, the contention of the learned counsel is not well founded.

Before the passing of the Bills of Exchange Act, it was the law that a promissory note payable on demand is not to be considered as overdue without some evidence of payment having been demanded and refused: Byles on Bills, 9th ed., p. 164, and cases there cited; and that this is still the law appears from *Glasscock v. Balls* (1889), 24 Q.B.D. 13. In that case Lord Esher, M.R., said, p. 15: "In this case the plaintiff sues the maker of a promissory note payable on demand as indorsee . . . The plaintiff cannot be said to have taken the note when overdue, because it was not shewn that payment was ever applied for, and the cases shew that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back." The Bills of Exchange Act is not referred to in the reasons for judgment, though it was cited by one of the counsel, but there can be no doubt that the Court must have been of opinion that the Act had made no change in the law as expounded in the cases before it was passed.

It is clear, I think, from the provisions of the Act, that a bill of exchange payable on demand is not to be deemed to be overdue

for the purpose of affecting the title of a person taking it, unless it appears on the face of it to have been in circulation for an unreasonable length of time.

Section 70 deals with this branch of the law, and by its first sub-section provides that: "Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it."

Sub-section 2 makes provision as to when such a bill is deemed to be overdue, within the meaning and for the purposes of the section, and it reads as follows: "A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time."

It is clear, then, that, had the instrument sued on been a bill of exchange, as it was negotiated on the day it was made, it would not have been deemed to be an overdue bill.

As sec. 186 makes the provisions of the Act relating to bills of exchange applicable to promissory notes—sec. 70, but for the provisions of sec. 182, would be applicable to promissory notes.

But, inasmuch as promissory notes payable on demand had always stood on a different footing from bills of exchange so payable, being, as it was said, more in the nature of continuing securities, sec. 182 was enacted for the purpose of continuing that distinction, and in order to provide that, though a bill payable on demand was to be deemed to be overdue when it appears on its face that it has been in circulation for an unreasonable length of time, a different rule should be applicable to a promissory note payable on demand, which should not be deemed to be overdue because at the time of its negotiation it appeared that a reasonable time for presenting it for payment had elapsed since its issue—I mean, of course, "overdue" within the meaning and for the purposes of sec. 70.

Although the provision of sec. 182 is a negative one, that "a note payable on demand is *not* to be deemed to be overdue . . .," the same effect ought to be given to it as to the affirmative one contained in sec. 70. It is probable that the negative form of ex-

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pression was used by the draftsman because the purpose of sec. 182 was to make an exception to the rule prescribed by sec. 70.

In any case, how is it possible, in the face of the provision of sec. 182 that a note payable on demand is not to be deemed to be overdue . . . by reason that it appears that "a reasonable time for presenting it for payment has elapsed since its issue," to hold that the note sued on is to be deemed to have been overdue at the time the plaintiffs became the holders of it, when it was indorsed to them on the very day of its issue?

In my opinion, the defence fails, and the plaintiffs are entitled to judgment for the amount of the note, with interest at five per cent. per annum from its date, with costs.

[DIVISIONAL COURT.]

D. C.

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Dec. 1.

RE FOSTER AND TOWNSHIP OF RALEIGH.

Municipal Corporations—Powers of Licensing and Regulating—Billiard Tables—By-law—Jurisdiction of Council—Motives Influencing Action—License Fee—Prohibitive Amount—Imposition for Revenue Purposes—Provincial Legislature—Powers of—B.N.A. Act, sec. 92 (9)—Delegation of Powers.

The decision of MIDDLETON, J., *ante* 26, affirmed by a Divisional Court.

APPEAL by Charles Foster from the order of MIDDLETON, J., *ante* 26, dismissing the appellant's motion to quash a by-law passed by the council of the township, under sec. 583, sub-secs. 4 and 5, of the Consolidated Municipal Act, 1903, for licensing and regulating the keeping of billiard tables for hire and fixing a license fee.

November 30. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. M. Ferguson, for the appellant, argued that the township had, under the guise of a licensing by-law, passed one which was in effect prohibitive, as shewn by the evidence and the facts in the case. There had been practically a campaign for the purpose of abolishing the applicant's pool-room, in which the members of the council had taken an active part. The license fee charged, \$100 per table, was out of all proportion with that charged in other places—in Toronto,

for example, where the fee was \$20 for the first table, and \$10 for each of the others, or Chatham, where it was \$10 and \$5. The fact that the building used by the applicant was not of an imposing character had nothing to do with the case. The *animus* of the council was shewn by the fact that they had passed a subsequent by-law, amending the first, providing that there should be no pool-room within fifty yards of a saloon. This second by-law was aimed particularly at the applicant. The fee charged was much larger than could possibly be required for the *bonâ fide* purpose of regulation or inspection, and the by-law was, therefore, one for raising a revenue, which was *ultra vires* of the council. The following cases were referred to: *In re Talbot and City of Peterborough* (1906), 12 O.L.R. 358; *In re Neilly and Town of Owen Sound* (1875), 37 U.C.R. 289; *Rowland v. Town of Collingwood* (1908), 16 O.L.R. 272.

¶ *J. G. Kerr*, for the respondent corporation, argued that the by-law had been passed in the interest of the public. It was necessary to impose a license fee sufficient to pay for the necessary inspection of the pool-room, which was the first one established in the township. It was not the fact that the business connected with the room was the applicant's only means of livelihood, and, in any event, the applicant had no right to insist that a business of this kind should provide him with a living. If he could not make it pay in the limited area and in the unattractive premises selected by himself, let him go somewhere else. The reasons given, and the authorities cited in the judgment below, cover the whole ground. The following cases and authorities were referred to: Biggar's *Municipal Manual*, p. 341; *Re Karry and City of Chatham* (1910), 21 O.L.R. 566; *Dillon on Municipal Corporations*, 4th ed., pp. 423, 428; *Cooley on Taxation*, 3rd ed., pp. 1135-1142; 25 Cyc. 599, 611; *Pigeon v. Recorder's Court and City of Montreal* (1890), 17 S.C.R. 495.

Ferguson, in reply.

December 1. FALCONBRIDGE, C.J.:—I think that the appeal should be dismissed with costs, for the reasons given by the learned Judge in the Court below, with which I agree.

BRITTON and RIDDELL, JJ., concurred.

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[IN THE COURT OF APPEAL.]

C. A.

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Dec. 5.

Criminal Law—Carnal Knowledge of Girl under Fourteen—Second Count for Illicit Connection when Girl over Fourteen—Trial of Defendant on both together—Discretion of Trial Judge—Application for Reserved Case—Second Count Struck out after Evidence given on both together—Conviction on First Count—Withdrawal of Evidence from Consideration of Jury—Prejudice—Exhibiting Child of Prosecutrix to Jury—Pointing out Resemblance to Defendant—Admissibility.

The indictment against the prisoner contained two counts: (1) under sec. 301 of the Criminal Code, for carnal knowledge in 1907 of a girl under fourteen years of age; (2) under sec. 211, for illicit connection in 1909 with the same girl, then being over fourteen and under sixteen years of age, and of previously chaste character. The trial proceeded on both counts, but at its close the Judge struck out the second count, on the ground that, the girl having sworn to the connection charged in the first count, she was not chaste at the time of the connection charged in the second count. The jury found the accused guilty under the first count. According to the report of the proceedings at the trial, no request was made for separate trials on the two counts; but it was stated in argument that such a request had been made. The jury were plainly told that evidence admitted upon the second count was not admissible upon, and not to be applied to, the first count. The trial Judge recorded a conviction and refused to reserve a case; the defendant asked for leave to appeal and for a direction to the Judge to state a case:—

Held, that it was within the power of the Court to try the prisoner upon the two counts at the same time (secs. 856, 857, of the Code); it was a matter for the discretion of the trial Judge; if the question as to the manner of trial was one of law, a reserved case was properly refused; and, if not one of law, there was no power to reserve a case.

Held, also, that, as the evidence applicable only on the second count was withdrawn from the jury, the defendant was not, as a matter of law, prejudiced by that evidence, whether admissible or inadmissible on the second count.

During the trial the child of the prosecutrix, the issue, as she swore, of her connection with the accused in 1909, was produced and shewn to the jury, and its resemblance to the defendant pointed out:—

Held, not improper nor inadmissible.

Per MEREDITH, J.A.:—It would be better and more regular to have the likeness testified to by witnesses.

MOTION by the defendant for leave to appeal from his conviction before WINCHESTER, Co.C.J., and a jury, in the General Sessions for the County of York, and for a direction to the Judge to state a case for the opinion of the Court.

The indictment of the defendant contained two counts: (a) that in or about the months of November and December, 1907, he had carnal knowledge of Elsie May Yeatman, a girl under the age of fourteen years, not being his wife, and thereby committing an indictable offence, contrary to the provisions of the Criminal Code; (b) that during the month of July, 1909, he had illicit connection

with Elsie May Yeatman, a girl of previously chaste character, then being above the age of fourteen years and under the age of sixteen years, and thereby committing an indictable offence, contrary to the provisions of the Criminal Code.

The notice of the motion stated that objection was taken at the trial by counsel for the accused to the indictment and to the two charges being tried together, and, further, that the second charge was improperly laid and should be withdrawn and no evidence taken thereunder; that the learned Judge overruled the objection, and the evidence on both charges was heard by the jury, and arguments of counsel for the Crown and the accused were thereon addressed to the jury; and that the learned Judge then withdrew the second count from the jury, as improperly laid, on the ground that the prosecutrix was not of previously chaste character, as appeared by the evidence at the preliminary hearing before the magistrate and at the trial.

The prisoner was found guilty on the first count. The learned Judge recorded a conviction, and refused to state a case, but suspended sentence to allow this motion to be made.

The questions which the defendant desired to have argued were as follows:—

1. Whether it was proper for the Crown, in view of the evidence of the prosecutrix given at the preliminary hearing, to lay the two charges together and include them in one indictment; and whether it was proper, all the evidence having been taken and heard under both charges, to submit the first one to the jury, on the ground that such course would (and did in this instance) result in a mistrial and miscarriage of justice and substantial wrong to the accused.

2. Whether it was not improper to exhibit the child of the prosecutrix before the Judge and jury as evidence against the defendant and for the Crown counsel to make comments thereon imputing its paternity to the accused.

3. Whether it was proper to hear any evidence against the accused, on the first count, of alleged criminal intimacy with the prosecutrix after the year 1907 or subsequent to the time she became fourteen years of age.

4. Whether there was any evidence of carnal knowledge to convict the accused by a jury uninfluenced or unbiassed by evidence of alleged criminal intimacy subsequent to the year 1907, or the

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time the prosecutrix became fourteen years of age, in view of the lack of corroboration of the testimony of the prosecutrix and her own contradictions.

5. And whether, on the above or other grounds appearing, as well as the discovery of new evidence, there should not be a new trial of the accused.

November 17. The motion was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

T. C. Robinette, K.C., and *C. W. Plaxton*, for the prisoner. It was improper for the Crown to lay two charges together, and include them in one indictment, and, all the evidence having been taken and heard under both charges, to submit the first one to the jury, because such a course resulted in a mistrial. Further, it was improper to exhibit the child of the prosecutrix before the Judge and the jury as evidence against the defendant. It was improper to hear any evidence against the accused on the first count of alleged criminal intimacy with the prosecutrix subsequent to the time when she became fourteen years of age. There was no evidence of carnal knowledge upon which the accused could be convicted by a jury unbiassed by evidence of alleged criminal intimacy subsequent to the time when the prosecutrix became fourteen years of age, in view of the lack of corroboration of the testimony of the prosecutrix. In support of these contentions the following authorities were referred to: Roscoe's Criminal Evidence, 13th ed., p. 731; *The Queen v. Paul* (1890), 25 Q.B.D. 202; *The King v. Lougheed* (1903), 6 Terr. L.R. 77; Russell on Crimes and Misdemeanours, 7th ed., p. 1953; *The Queen v. Gibson* (1887), 18 Q.B.D. 537.

E. Bayly, K.C., for the Crown. It was quite proper to lay the two charges together and include them in the one indictment. This is not a question of law; it is a question of discretion: secs. 856, 857, and 858 of the Criminal Code, 1906. It was proper to shew the child in Court. The child could be considered as part of the *res gestæ* or as an exhibit. There was no need of corroboration: secs. 301 and 1002 of the Criminal Code.

Robinette, in reply.

December 5. MACLAREN, J.A.:—The accused was tried at the General Sessions of York, before the Senior County Court Judge

and a jury, on an indictment containing two counts: (1) under sec. 301 of the Criminal Code, for having carnal knowledge of a girl under fourteen years of age; and (2) under sec. 211, for having illicit connection with the same girl when she was between fourteen and sixteen years of age, she then being of previous chaste character.

The trial proceeded on both counts, but at its close the Judge struck out the second count, on the ground that, the girl having sworn to the connection charged in the first count while she was under fourteen, she was not chaste at the time of the connection charged in the second count after she was fourteen.

During the trial the child which she swore was the issue of her connection with the accused was produced and shewn to the jury and attention called to the colour of its hair.

The jury found the accused guilty under the first count.

Application was made to the trial Judge for a reserved case and refused, and the accused now moves this Court for leave to appeal therefrom and to have a case stated by the Judge.

The first ground urged is that the joinder of the two counts and the trial thereon was improper. This ground is untenable. Section 856 of the Criminal Code provides that "any number of counts for any offences whatever may be joined in the same indictment;" and sec. 857 reads as follows: "When there are more counts than one in an indictment each count may be treated as a separate indictment. (2) If the court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately."

The report of the proceedings at the trial put in with the present application does not shew that any request was made for separate trials on the two counts; but it was stated in argument before us that this had been done. Assuming that the request was made, it was, under sec. 857, a matter for the discretion of the trial Judge. We have no right to review that discretion, or to substitute our own for it. Appeals to this Court are limited to questions of law.

It may be observed, however, that the present case would appear to be an eminently proper one for two counts. Before the trial, the age of the girl was not determined. If it was proved that the girl was under fourteen when the offence was first com-

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mitted, the jury might find the accused guilty on the first count; if it was proved that she was then over fourteen, they might find him guilty on the second.

At the close of the evidence, counsel for the accused moved to quash this second count on two grounds: (1) as being too late; and (2) for want of corroboration. The trial Judge refused this motion, and properly so; but later he quashed it on the ground above stated, which was not taken on behalf of the accused. We are not called upon to say whether this count was properly quashed; for myself, I do not see why the case might not have gone to the jury on both counts. The accused, however, cannot well be heard to complain of it, as it was precisely what he had asked to be done. It may be that the receipt of evidence under the second count prejudiced the jury against the accused; but, as above shewn, it was properly received, and the fact that the count was afterwards struck out does not have a retroactive effect, and make illegal that which was perfectly legal when it was done. The Judge properly directed the jury not to be influenced by this evidence when they were considering the first count, and it was withdrawn from their consideration.

The other ground as to the production of the child is also unfounded. No objection was taken to this at the time; but, apart from this, it is a practice which has long been followed in cases of disputed paternity. The first reported case, so far as I am aware, is in 1767, where Lord Mansfield admitted such evidence in the *Douglas Peerage Case*. This was followed in England in the *Aylesford* and *Townsend Peerage Cases*, in *Piercy's Case*, 12 Howell's State Trials, p. 1199, and in the *Tichborne Case*, and also in *Day v. Day* in 1784, in *Morris v. Davies* (1837), 5 Cl. & Fin. 163, and in *Bosville v. Attorney-General* (1887), 12 P.D. 177. In Ireland the rule is the same: *Bagot v. Bagot* (1878), 1 L.R.Ir. 308. In this Province the same practice has been followed, the only reported case being *Udy v. Stewart* (1885), 10 O.R. 591. See 102 Law Times Journal, p. 188.

I do not think the accused has made out a case that would justify us in directing the County Court Judge to state a case for this Court.

MEREDITH, J.A.:—The first point made raises a question of pro-

cedure rather than of law. It was quite within the power of the Court to try the two counts together. In the result, it proved that it would have been more in the prisoner's interest if they had not been tried together, but at the beginning of the trial that was not apparent; he may well have thought that it might be advantageous to him; that the jury might find him guilty, if at all, of the lesser offence only; that, if tried on the one count, the graver, the jury might find a verdict of guilty rather than acquit altogether. At all events no objection was made; nor any application for a separate trial, according to the report of the proceedings at the trial. So that, if the question were one of law, a reserved case was rightly refused on this point, whilst, if not one of law, there was no power to reserve it.

It follows that the second point also fails. The evidence was admissible, and admitted, upon the second count; and the jury were plainly told that it was not admissible upon, and not to be applied to, the first count. The fact that the trial Court afterwards withdrew from the jury the second count, on the ground that the evidence of the prosecutrix was inconsistent with guilt, does not affect the question materially; even though the Court may have erred, as I think it did, in that ruling, because the jury were not bound to believe all that that witness said; they might discredit her as to the earlier, and credit her as to the later, intercourse.

The last point is one upon which there is a very considerable conflict of authority in the Courts of the several States of the United States of America; but it has long been the practice of the Courts of this Province to permit the production of the child at the trial and the pointing out to the jury of the likeness in the child to the defendant. The cold water thrown upon the practice by Cameron, C.J., in delivering the judgment of the Court in the case of *Udy v. Stewart*, 10 O.R. 591, does not seem to have had any appreciable effect upon it.

I am unable to see anything objectionable in principle in such evidence; and it ought to be within the power of the Court to prevent an abuse of the practice; though I think it would be better, and more regular, if the likeness were testified to by some witnesses, in all cases; otherwise a court of appeal is at a great disadvantage if called upon to deal in any way with such evidence, as well as for other reasons. Such evidence seems to have been always con-

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sidered admissible in England. The subject is interestingly discussed and many cases upon it collected by Mr. Wigmore in his work on trial evidence.

It is also to be borne in mind that the evidence was given upon the second count, and was withdrawn from the jury with the withdrawal of that count. It is, however, not unreasonable for the prisoner to say that, though he was obliged to submit to the prejudice of his case on the first count which might be created by the admission of admissible evidence on the second count which was not admissible on the first, he ought not to be obliged to submit to the prejudice which might be created by the admission of inadmissible evidence; but the answer is, all was withdrawn, and that is sufficient in law, however lame it might be in fact.

I would, therefore, dismiss this application.

MOSS, C.J.O., GARROW and MAGEE, J.J.A., concurred.

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REX v. McNULTY.

Criminal Law—Murder—Counselling and Procuring—Illegitimate Child—Evidence—Intimacy of Prisoner with Mother of Child—Admissibility—Improper Relations with other Men—Inadmissibility—Accomplice—Corroboration—Direction to Jury.

The prisoner was tried and convicted upon a charge of having murdered an unnamed child of which one Mary D. had been delivered. The child was actually put to death by its mother; the case of the Crown against the prisoner was that he counselled and procured her to do the act, and so rendered himself a party to and guilty of the crime. Mary D. was the principal witness for the Crown; she gave evidence that the child was the prisoner's and that he had instructed her to strangle it and afterwards to dispose of its body, and that she carried out his instructions. Evidence was offered by the Crown, and admitted, tending to shew the intimacy of the prisoner with Mary D. for a period long prior to the birth of the child. Evidence was offered on behalf of the prisoner, and rejected, tending to shew the intimacy of Mary D. with other men, both before and immediately after the murder:—*Held*, that the evidence offered on behalf of the Crown was properly admitted. *Per* Moss, C.J.O., that it was important for the Crown to shew such a set of facts and circumstances as might reasonably lead to the existence of a motive on the part of the prisoner to be rid of the child; and the jury were also at liberty to draw from these facts and circumstances such inferences as were proper with regard to the prisoner's influence over the woman. *Held*, also, that the evidence offered on behalf of the prisoner was not material, and was properly rejected. *Semble*, *per* MEREDITH, J.A., that if it had been shewn that the prisoner was made aware of the intimacy of the woman with other men, it might have been admissible in answer to the evidence of motive.

Held, also, that the evidence given by the Crown afforded some corroboration of the testimony of the woman; and that the Judge's direction to the jury as to corroboration of her testimony, she being an accomplice, was unobjectionable from the prisoner's standpoint; the weight to be attached to the evidence was for the jury; and they were at liberty to convict upon the woman's evidence alone if they felt convinced of her truthfulness.

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CROWN case reserved.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

Case stated by BRITTON, J., under the Criminal Code, after trial and conviction of the prisoner upon a charge of having on or about the 26th March, 1910, murdered an unnamed child of which one Mary Dolan had lately been delivered.

The evidence, which is made part of the case, reveals that the child was actually put to death by its mother, Mary Dolan, and the case of the Crown against the prisoner was and is that he counselled and procured her to do the act, and so rendered himself a party to and guilty of the crime.

Mary Dolan was the principal witness for the Crown. She deposed to the existence between the prisoner, a married man, and herself, of a criminal intimacy extending over a period of about four years; that he was the father of two children of which she was the mother, the last born being the child in question; that, at his instigation, she had left the first child on the door-step of an institution in Buffalo, with a sum of money supplied by him; that she became pregnant the second time in the month of June, 1909; that not long after she communicated the fact to the prisoner, who procured and advised her to take certain pills with a view to bringing about a miscarriage; that she took them without effect; that eventually she was obliged to leave her father's house in order to avoid discovery by him of her condition, and was thereafter for some time kept concealed by the prisoner in a loft over a driving-shed or stable in Orillia; that between the latter part of October, 1909, and the first week of January following, she, at his instance and with money supplied by him, paid two visits to Toronto, during the latter of which she met a Mrs. Lavoie; that finally on the 9th February, 1910, she again, at the instance of and with funds supplied by the prisoner, went to Toronto and into lodgings at Mrs. Lavoie's, where she remained until the 26th March, during which time the child was born; that the prisoner was made aware of the

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birth, and afterwards wrote letters to her; that on the 25th March she received a letter from him in which he told her to strangle the child, and instructed her in what manner she might commit the deed and dispose of the body; that, in consequence, she did on the 26th March leave Toronto, taking the child with her, and went to Hawkeston, a station on the Grand Trunk Railway; that later she strangled the child and placed its body in her valise, and proceeded to Orillia, and there met the prisoner, and told him what she had done; that he told her to drop the body from the railway bridge crossing "the Narrows," the stream connecting Lakes Simcoe and Couchiching, and that she did so. There is much more in detail, but the foregoing is a brief outline of her testimony. The body was found in the following July and Mary Dolan was arrested, and she then accused the prisoner.

Upon cross-examination Mary Dolan was asked whether she was improperly intimate with other men whose names were given, and she positively denied illicit intercourse with any of them.

The case states that evidence was offered by the Crown and admitted tending to shew the intimacy of the prisoner with Mary Dolan over a period long prior to the birth of the infant murdered, and that it was contended on behalf of the prisoner that such evidence was irrelevant and should not have been received.

It is also stated that evidence was offered on behalf of the prisoner tending to shew the intimacy of Mary Dolan with other men, both before and immediately after the murder, and that such evidence was rejected.

It is further stated that it was contended on behalf of the prisoner that none of the evidence offered by the Crown as corroborative of the statements of Mary Dolan given in evidence was in fact corroborative thereof, and that the learned trial Judge should have so told the jury.

The questions submitted are:—

1. Was my ruling as to admission and rejection of evidence correct?
2. Was my direction to the jury as to corroboration of Mary Dolan, an accomplice, proper?

November 24. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

A. E. H. Creswicke, K.C., and J. T. Mulcahy, for the prisoner. The evidence admitted by the learned trial Judge as to the intimacy of the prisoner with Mary Dolan covered a very wide range and a long period of time, but had no real connection with the crime of which he was accused, and should have been excluded. On the other hand, the evidence offered on behalf of the prisoner, but rejected by the trial Judge, was admissible, as it tended to shew that his alleged domination and exclusive influence over the girl did not exist, as she had been criminally intimate with other men, who might have influenced her in the same way as the prisoner did. Some of the circumstances sworn to by the girl, such as the alleged secret residence in the stable, were almost incredible, and shewed what great necessity there was for corroboration of her story. It is true that in *Rex v. Frank* (1910), 21 O.L.R. 196, it has been held that corroboration is not absolutely necessary, but the jury should have been told that the evidence offered by the Crown as corroborative was not really so, because it was as consistent with the theory of the prisoner's innocence as with that of his guilt. The Judge should have told the jury, "There is no corroboration, but you *may* convict without it." The following cases were referred to: *Rex v. Beauchamp* (1909), 73 J.P. 223, 224; *Rex v. Tate*, [1908] 2 K.B. 680; *Rex v. Webb* (1834), 6 C. & P. 595; *Rex v. Meyer* (1908), 21 Cox C.C. 673, 676; *Regina v. Farler* (1837), 8 C. & P. 106; *Rex v. Everest* (1909), 73 J.P. 269; *Rex v. Pearson* (1910), 74 J.P. 175; *Rex v. Joiner* (1910), 74 J.P. 200; *Rex v. Graham* (1910), 74 J.P. 246; *Rex v. Fisher*, [1910] 1 K.B. 149, 153; *Rex v. Stoddart* (1909), 73 J.P. 348.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown, argued that the trial Judge had been strictly fair and as favourable as possible to the prisoner in charging the jury on the question of corroboration. Corroborative evidence was such as tended to make it probable that the prisoner had committed the crime, and the evidence tendered by the Crown was the only kind of evidence that could be given in such a case. The trial Judge was right in rejecting the evidence tendered on behalf of the prisoner as to the alleged relations of Mary Dolan with other men, as it had no relevance to the issue on which he was tried. The evidence shewed that the prisoner believed that he was the father of the murdered child.

Creswicke, in reply.

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December 5. Moss, C.J.O. (after setting out the facts as above):—As to the first question: it was important for the Crown to shew, if it could, such a set of facts and circumstances as might reasonably lead to the existence of a motive on the part of the prisoner to be rid of the child. During the whole period of continuance of the alleged intercourse between him and Mary Dolan, he was a married man and she was an unmarried woman. Any facts or circumstances tending to shew the existence of an intimacy which should not exist between persons so circumstanced were proper to submit to the jury as affording grounds upon which they might reasonably draw the inference that, if the fact of the birth became known in the neighbourhood, it would be generally believed that he was the child's father, and that he would, in consequence, be subjected to much embarrassment and annoyance. The jury were also at liberty to draw from these facts and circumstances such inferences as were proper with regard to the prisoner's influence over the woman.

The learned Judge was careful to confine the evidence tendered by the Crown on this branch of the case to matters bearing on these lines of inquiry, and nothing appears to have been admitted that should have been excluded.

With regard to the rejection of evidence, it is sufficient to say that the proposed testimony was not material. Evidence of intimacy with other men before and immediately after the murder could only be admitted for the purpose of contradicting Mary Dolan's answers to questions addressed to her on cross-examination.

These questions were admissible as tending, if answered affirmatively, to impair the value of her testimony with the jury, but, having been asked and answered, the prisoner was bound by the answers, and was not at liberty to contradict them. Evidence of statements made by her tending to cast doubt upon the paternity of the child was admitted, and the prisoner had the benefit of that before the jury.

As to the second question, the learned trial Judge could not properly have directed the jury that none of the evidence offered as corroborative of the statements of Mary Dolan was in fact corroborative thereof. Not to mention his letters to Mary Dolan after she became pregnant, the fact of his communicating with Mrs. Lavoie after the birth of the child, his payment of \$5 to her in

answer to her demand for lodging and expenses due by Mary Dolan, his coming to the railway station to meet Mary Dolan in answer to her message and note sent by the two boys who were called as witnesses, and various other circumstances, were all corroborative. The weight to be attached to them was for the jury. But they were at liberty to convict upon the testimony of Mary Dolan alone if they felt convinced of her truthfulness. The learned Judge cautioned them against doing so, in terms most favourable to the prisoner, and it may be assumed that, in arriving at their verdict, they took into consideration everything that had been presented. And it cannot be said that there was not corroborative evidence sufficient to warrant the verdict.

The questions should be answered in the affirmative.

GARROW, J.A.:—The evidence admitted, to which objection was taken, was given for the purpose of shewing the degree of intimacy existing between the prisoner and Mary Dolan prior to the commission of the offence, and also for the further purpose of proving the extent of the influence, if any, which the prisoner was able to exert over her prior to that time: both important elements in considering, as the jury was bound to consider, the probability of Mary Dolan having been influenced by and having acted upon the advice contained in the letter which she says she received from the prisoner on Friday the 25th day of March, preceding the murder.

The evidence tendered by the prisoner and rejected was that of several men who were called to prove that they had had sexual intercourse with Mary Dolan. She had been asked when in the witness-box and had in each case denied such intercourse, but, assuming that the witnesses so called would have contradicted her, such contradiction would have been wholly irrelevant and immaterial. The prisoner's intimate relations with the woman extending over a long period prior to the date of the offence in question are abundantly established. There is absolutely no reasonable room to doubt, upon the evidence, that Mary Dolan was sent for her lying-in at Toronto, to the nurse Mrs. Lavoie, at the prisoner's expense. His final payment, direct to Mrs. Lavoie herself, of \$5 in settlement of the account, is, added to the evidence of Mary Dolan and his own letters produced, alone sufficient upon that subject. And, whatever the actual paternity of the child, it is clear that the

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prisoner, for reasons doubtless sufficient to himself, had assumed the burden as his own, and had, therefore, a motive to get rid of it if he could.

As to the alleged misdirection upon the question of corroboration, it appears to me that the prisoner has no good cause of complaint. In his very careful and temperate charge the learned Judge told the jury that they might convict if from the manner in which the witness had given her evidence, and from all the circumstances which had been given in evidence, they were of the opinion that the story was one which they must accept as true; but cautioning them that, unless they found her story as to the counselling, which rested solely upon her own evidence, to be true, they should acquit. Upon objection to the charge being taken by counsel for the prisoner, the jury was recalled, and the learned Judge said: "It is not proper to convict a person on the uncorroborated evidence of an accomplice, but I cannot withdraw the case from you, and it must go to you, and you are in a position, if you think proper, to accept the statement of the witness in the box, if you have no doubt about it. You are at liberty to do that and find the prisoner guilty, if warranted by the evidence, notwithstanding what I say to you about it being not usual or proper to convict a person on the uncorroborated evidence of an accomplice."

This clear, unambiguous, and under the circumstances impressive language, seems to me quite to take away any foundation for the prisoner's complaint that the jury was not duly cautioned as to the danger of relying upon the uncorroborated evidence of Mary Dolan.

I would, therefore, answer both questions in the affirmative.

MEREDITH, J.A.:—The evidence objected to was, in my opinion, admissible. Proof that the prisoner was the father of the illegitimate child was material to the issue, as was also other proof of any motive for committing the crime, as well as proof of the real intention of the prisoner in that which it was testified he had written respecting strangling it; these were things which were properly in controversy at the trial; and all of such evidence was properly directed to one or other of such questions.

The evidence rejected was inadmissible. It was not material to the issue. If it had been shewn that the prisoner was made aware of it, it might have been admissible in answer to the evidence of motive.

The objection to the charge is unsubstantial; it amounts to this, that the learned Judge did not tell the jury there was no corroboration of the woman's testimony; he was not asked to do so; and, if he had been, and had complied, he would have erred; there were circumstances which any Judge or juror might have considered corroboratory; whether they bore more or less upon the fact of guilt or innocence was a matter entirely within the province of the jury.

I am unable to find error in any of the matters reserved in this case.

MAGEE, J.A.:—The learned Judge states: (1) that evidence was offered by the Crown and admitted by him tending to shew the intimacy of the prisoner with Mary Dolan, a witness for the Crown, who was the mother of the murdered infant, and who actually committed the crime, the facts relied on extending over a period long prior to the birth of the infant murdered, and it was contended on behalf of the prisoner that such evidence was irrelevant and should not have been received; (2) that evidence was offered on behalf of the prisoner tending to shew the intimacy of the said Mary Dolan with other men, both before and immediately after the murder, and he rejected such evidence; and (3) it was contended by the prisoner that none of the evidence offered by the Crown as corroborative of the statements of the said Mary Dolan given in evidence was in fact corroborative thereof, and that he (the Judge) should have so told the jury. Although stating these facts concisely in this way, the learned Judge also states that the evidence taken at the trial and his charge are made part of the case. Both have, therefore, to be examined.

Although the indictment charged the prisoner with the murder, it was not contended for the prosecution that he was present at its commission, or had taken any actual personal part in it beyond having counselled and procured Mary Dolan to commit it.

Section 69 of the Criminal Code of 1906 declares that "Every one is a party to and guilty of an offence who,—(a) actually commits it; or . . . (d) counsels or procures any person to commit the offence."

It is manifest that counselling a murder will not make a man guilty of murder unless the murder is committed. Nor will he be

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so guilty if it is shewn that his counsel had in fact no effect in inducing the actual perpetration, although that does not mean that to ensure his conviction it must be committed under the precise circumstances of time, place, or manner which he may have counselled. While it was necessary, therefore, for the Crown to prove the actual murder, and that the prisoner counselled it, it was also important to shew, by inference or otherwise, that that counsel had some effect in bringing it about, as well as some motive for his conduct.

Mary Dolan, twenty-four years of age, who had on the previous day been herself tried for the murder and found guilty, was called as a witness for the prosecution. She stated that her father was a farmer near Orillia, and the prisoner a hotel-keeper and married. She had known him all her life, and about four years before the trial illicit intercourse had begun between him and her, resulting in pregnancy and the birth of a child in Buffalo, whither she was sent by her parents for her confinement. That child, she said, she had left on the door-step of a Home there, with a small sum out of money received from the prisoner. Upon her return home the intimacy was, she said, renewed, although her parents did what they could to prevent it, but she and he had secret meetings and correspondence, and once he had entered her bedroom at night, she opening the window, while another young woman was asleep in the room. No dates were given by her for these occurrences, but she said that she became again pregnant as a result of intercourse on the 7th June, 1909, and she discovered the fact on the 31st July, or late in July, and apprised the prisoner of it, and that subsequently he gave her some pills, the object of which she does not state. That she put as occurring, she thought, in August or September, although she produced a letter from him to her of the 25th July, expressing the hope that she would soon be all right, and making a covert allusion, which, she said, referred to the pills, and saying he had always done what he could for her and would yet. A number of later letters from him in July and August, in endearing terms and shewing jealousy of attentions from others and referring to his secret attempts to meet or communicate with her and expressing desire for meetings, were put in evidence. All earlier letters written before the pregnancy were rejected, on objection being made for the defence. In October, on account of her condition, she left home

and went to the defendant at Orillia, where he placed her in a cheerless, fireless loft, without artificial light, over a stable of his hotel. Here she remained secreted night and day alone, except for visits from him, her meals being brought to her by him. This continued, she says, until the 9th February, 1910, with the exception of three intervals, during one of which she paid a secret visit to her own home, unknown to her father; another in November, a visit to Toronto, at the prisoner's instance and expense, to see if she could procure an abortion, which, however, she was afraid to attempt; and another visit to Toronto, also at his expense, about New Year, when she made arrangements with a Mrs. Lavoie for lodgings during her expected confinement. On the 9th February she went to Toronto and remained there at Mrs. Lavoie's till the 26th March. Her child was born on the 10th March. On Good Friday, the 25th March, Mrs. Lavoie went away on an Easter visit, leaving Mary Dolan and her child at the house and expecting to find them there on her return. During the stay in Toronto, Mary Dolan says, she received several letters from McNulty, some enclosing money to pay her expenses, and she had written him to give her money to put the baby in some Home, and he had replied that he could not and told her in the letter to take a car some night to Sunnyside, a place in the outskirts of Toronto, and leave the child there some place. That letter, she says, came on the Monday before Good Friday, and she answered that she could not. Then she says that on Good Friday, after Mrs. Lavoie had left, she received a letter from the prisoner enclosing \$5 and telling her to go home and take the child to Hawkeston, which is the next station before reaching Orillia on the railway from Toronto, and to strangle it and leave it somewhere between Hawkeston and Orillia. That evening she said she telephoned him that she would come home the next day. On Saturday she left Toronto with the child for Orillia, first destroying the prisoner's letters received there. At Hawkeston she got off the train, intending to walk to Orillia and carry out his instructions, but, being overtaken by an acquaintance while walking, accepted an invitation to tea, and that evening was driven to near Hawkeston station to take the later train to Orillia. Instead of going direct to the station, she walked some distance from it, and strangled the child and put the body in her suit-case, and with it took the train to Orillia, where she stayed all night in the railway

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station. On the next day, Sunday, she sent verbal and written messages by two boys to the prisoner to come to her at the station, and received a written note that he would meet her on Monday evening. She says they met at the appointed place, and she told him what she had done, and that she then had the body with her in the suit-case, and he told her to take it to a place about two miles away and drop it, with a stone attached, into the water there, and she did so and went to some friends (Symingtons) for a few days and then to her home. Later on the body was found and on the following day, Saturday, the prisoner came to her, she being at the railway station, and told her and cautioned her against shewing concern or implicating him. Subsequently she was arrested, and admitted her own guilt, and said it was at the prisoner's instance.

At this trial of McNulty, on her examination in chief, she said she had done away with the baby because she was homesick and wanted to get home, and knew she could not take it home, and she had no money to put it in a Home, and she had got the letter from him telling her to do it, and she had never thought of doing it before getting that letter, and would not have done it if she had not received the letter. On cross-examination, being asked as to why she stayed in the stable, she said the prisoner told her to stay there, and she liked him and was afraid of him, and did not know whether it was love or fear which compelled her. She did everything he told her, and it was more from fear than love, and he did not want her to go out and talk to anybody else—only to him. She could not just tell what kind of fear it was. She did not think he would do any harm to her. She did not know what he might do to her. She could not answer why she felt she had to do whatever he told her, and the feeling of love and fear began with their intimacy four years previously, and she admitted she was infatuated with him. She denied having had intercourse with any of a number of other men whose names were mentioned to her or with any one before the prisoner. She admitted having written to the prisoner's wife from Toronto denying having had anything to do with him. She had also written Mrs. Lavoie before leaving Toronto on the 26th March, untruthfully, that she had received a letter to come home, that her brother was not expected to live. Subsequently, at the prisoner's instance, as she said, she wrote her another untruthful letter under a disguised name.

Such was Mary Dolan's story, in effect, so far as is here material. In support of it the Crown called her parents, who said they had done what they could to prevent her intimacy with the prisoner; one Doyle, who said he had seen the prisoner on Dolan's place going towards the house about nine p.m. in November, 1907; another witness, the young woman who woke up in time to see him leaving Mary Dolan's bedroom by the window in the summer of 1908; and two others, Mr. and Mrs. Fidget, who saw him and her sitting together in the bush in July, 1909. Another Crown witness was Mrs. Lavoie, who had telephoned to McNulty on the day of the child's birth and about a week later from Toronto, but could not say it was he who was speaking with her, and she had met him in Orillia in June and asked him to pay the balance claimed as due her by Mary Dolan, and had said to him that she considered he was the man who ought to stand the expense, he had stood it so far, and he did not contradict that, but paid her \$5, and said that was all he would give. The two boys who had carried the verbal and written messages on Sunday the 27th March, and had read both the written slips or notes passing, were called in corroboration of Mary Dolan as to that. Another witness saw the prisoner and Mary Dolan talking at the railway station on the Saturday after the body of the child was found. The Chief of Police at Orillia and a police officer proved that, on his arrest, the prisoner said he did not know that Mary Dolan had a child and he had not seen her for months.

That was the evidence for the Crown.

For the defence, four of the men with whom Mary Dolan had denied intercourse were called. Three of them were asked as to it having occurred, but, on the objection of counsel for the Crown, the question was disallowed by the learned Judge, though pressed on the ground that the object was to shew the absence or improbability of any such influence over her as she imputed to the prisoner. To one of the three (McGregor) the questions referred to a time very shortly after her return from Toronto, and apparently while she was at Symingtons; to another (Spencer), who had not seen her since the spring of 1909, the question was pointed to a period about four years ago; and the third (Culford) was asked as to a time before April, 1908. As to the fourth witness (Symington), no time was indicated and no questions were asked him, the prisoner's counsel stating that he called him "with the same object,"

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but that, if it was ruled out, there was no use in pursuing it, and the evidence was rejected. McGregor had, however, detailed a conversation with Mary Dolan in the middle of April, 1910, in which he asked her if she was sure whether the child was McNulty's or Symington's, and she had answered to the effect that it had not a cross eye like Symington. That conversation she had denied.

During the trial the prisoner's counsel objected to the evidence as to the intimacy before June, 1909, and the secret interviews and correspondence and the parents making efforts to prevent it. He also objected to the prisoner's letters being read and to evidence as to the stay in the loft and as to the pills. After the jury had been charged by the learned Judge and had retired, counsel also objected that the jury should be specifically directed that, where the evidence of an accomplice is the main evidence, it should be corroborated in material particulars, and that they need to be careful and need to be satisfied beyond any question at all that the evidence of the accomplice is true in every respect. He also objected that in several respects the details of the evidence had not been correctly presented to the jury. The jury were recalled, and these latter details were referred to by the Judge, so that no further objection from the prisoner's counsel was made as to them, and further instruction was given the jury as to the necessity for corroboration of evidence of an accomplice. The jury having again retired, counsel for the Crown took objection to the charge as having given them the impression that there was no corroboration, whereas he asserted that there were a large number of circumstances furnishing corroboration, and the jury should be so told. Thereupon counsel for the prisoner contended that there was no corroboration; it all rested on Mary Dolan's testimony; and any other circumstances proved were all consistent with the prisoner's innocence of the crime charged. The learned Judge refused to recall the jury as requested by the Crown counsel.

After the jury had brought in a verdict of "guilty," counsel for the prisoner asked to have a case reserved, and was told to submit the points upon which he asked it, and they would then be considered. The present case here stated is the result.

Upon the argument so strongly presented here by Mr. Creswicke, for the prisoner, he referred to various alleged inconsistencies in Mary Dolan's evidence and undoubted untruths told by her, as

might well be expected would be the case, but these were all matters for the jury, who seem to have had fully impressed upon them by counsel on both sides, as well as from the Bench, the necessity for the greatest care in considering her evidence.

As regards the alleged improper admission of evidence, I see no ground of complaint. It was material to shew the interest and motive of the prisoner, and therefore the intercourse between him and the young woman, as giving him reason to believe the child would be his; the secrecy of that intercourse and of their communications, as shewing that he did not wish it to be known, and therefore would have an interest in the non-existence of any offspring resulting from it; and the furnishing of the pills and the instructions to attempt an abortion, as shewing a desire that the fruit of their intercourse should not live, not merely for his own sake but for the sake of her for whom he professed affection. Her statements with regard to these matters, including her concealment in the stable loft, were, therefore, clearly admissible, and in support of them his own letters and evidence of his escaping from the window and being seen near the house in the darkness, and being seen with her in the bush at a time when his letters shew that he was avoiding being seen by her parents while haunting their neighbourhood, were equally material, as well as the parents' evidence of having no knowledge and endeavouring to prevent any meetings.

From another point of view, the evidence would also be material, as tending to shew that his relations with her were such that she would the more readily accede to his wishes or advice. Thus their long continued friendship, intimate relations, and common parentage of two children, would be important facts for the jury to consider.

No objection was or is made or could properly be made to the admissibility of Emma Voysey's evidence as to seeing them in conversation at the railway station on the Saturday after the discovery of the body, or that of the boys who carried the messages on Sunday the 27th March, or of Mrs. Lavoie or the two police officers.

As to the alleged improper rejection of evidence, it may be that, if each or any of the four men called for the defence had sworn to having had intercourse with Mary Dolan, in the face of her denial it might have weighed with the jury in considering the reliability of her other testimony; but such evidence would clearly be improper and inadmissible for the mere purpose of discrediting her, and any

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weight it might have in that direction must be left out of consideration. It is, however, now argued that the questions should have been allowed, on the ground that, if intercourse with these men were proved, it would tend to shew the absence of or minimise the extent of any influence or dominance of the prisoner over the young woman, or would bear on the question of paternity of the child. The proposed evidence of Spencer and Culford was as to a period too early, and that of McGregor as to a period too late, to allow of any of them being its father. As no question was asked of Symington, there is nothing to shew that he was expected to speak of any date at which intimacy might have resulted in the birth of a child on the 10th March. The alleged answer by Mary Dolan to McGregor, if it was indeed given, was certainly no admission by her, but rather a pert denial that Symington could be the father, and does not of itself lay any foundation for inquiries from Symington as to an unspecified date. On the question of paternity, then, there is no ground for saying that the evidence proposed to be got from these four men was not properly rejected. Indeed, the questions were not at the trial put forward as bearing on that point, but as going to shew the absence of any dominating influence over the young woman. And, moreover, the real question, as regards the prisoner, was not whether in fact he was the father, but whether he thought or had reason to think he was the father, and so had a motive for his act.

Proof of intercourse between Mary Dolan and other men unknown to him would not have disproved intercourse with him or affected that question of his manifest belief which the Crown were offering proof of.

As to the admissibility of the proposed evidence as affecting the question of the prisoner's dominance over her, it is to be borne in mind that the real question in issue was whether he had in fact written the letter telling her to strangle the child. There was no suggestion throughout the trial that, if that counsel was given, it had no effect in bringing about the murder committed the day after its receipt. There was nothing whatever to indicate that the advice, if given, had not the effect it was intended to have. Whether she had intercourse with the others or not would not have shewn that she was entirely unaffected by the prisoner's letter, and that was the real question in the case, and intercourse with McGregor,

even within a week later or with Symington in June, 1909, would not have shewn that the letter had no influence with her, and, as I have already said, its weight on the question of her credibility as to the actual receipt of the letter must be left out of account. Even if the evidence were strictly admissible as tending to shew that his influence was not sufficient to prevent her going with other men, and therefore was not so great as she would imply, it certainly would fall far short of shewing that he had no influence with her, or that, assuming he had little influence, she had rejected the advice which he gave, and that its receipt had nothing to do with the crime; and that was the real point involved.

On the question as to the learned Judge's charge to the jury, there is, in my opinion, no ground for the prisoner to complain. The jury were distinctly told that Mary Dolan, on the Crown's shewing, was in the position of an accomplice; that it was said no person ought to be convicted on the uncorroborated evidence of an accomplice; but a person might be so convicted, and the case could not be taken from them; and, if they believed her statement in regard to the direction she got from the prisoner as to the killing, if they had no reasonable doubt about it, they might and ought to accept it; and, upon the jury being recalled, the learned Judge told them that it was not proper to convict a person on the uncorroborated evidence of an accomplice, but he could not withdraw the case from them, and it must go to them, and they were in a position, if they thought proper, to accept the statement of the witness, if they had no doubt about it, and they were at liberty to do that, and find the prisoner guilty, if warranted by the evidence, notwithstanding what he said to them about it being not usual or proper to commit a person on the uncorroborated evidence of an accomplice. The learned Judge had previously pointed out to the jury that the evidence was that of Mary Dolan alone as to the counselling by the prisoner, and as to that it depended wholly upon her testimony; and again that in her statement was included the one which made the prisoner guilty of the offence charged, and which, if not true, entitled him to an acquittal, and, unless they accepted that statement without any reasonable doubt, he was entitled to an acquittal; and that, no matter what his other conduct was, unless they found her story true with regard to the counselling of the murder, he was entitled to an acquittal; and they were cautioned

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that the evidence as to his advising the concealment of the body did not necessarily shew that he had advised the murder; and that much of detail had been said about the case in reference to things connected with it, and the relations between her and him, but it all came down to the one thing—did the prisoner write the letter and therein ask her to strangle the child? And, if he did not, then, no matter what his offence might be in other respects, he ought to be discharged as to this offence.

Dealing with alleged contradictions in or of her statement, the learned Judge told the jury that, if any one of them disentitled her to be believed, so that they could not accept her story freely and fully, then the whole matter was for them and their consideration. It was thus clearly put to the jury that there was no corroboration as to that which was the vital question in the case, and that, though it rested with the jury, it was not usual or proper to convict on the uncorroborated testimony of an accomplice.

I find no reason, from the prisoner's standpoint, to consider that the instructions to the jury were not proper.

Both the questions on which the opinion of this Court is asked should be answered in the affirmative.

MACLAREN, J. A., concurred.

[RIDDELL, J.]

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Dec. 7.

Will—Construction—Life Insurance in Favour of Wife—Bequest of Insurance Moneys in Trust for Wife during Life—Remainder to Persons not Preferred Beneficiaries—Ineffective Disposition—Insurance Act, secs. 159, 160—Other Benefits Given by Will—Election—General Rule—Exception.

The testator had insured his life for the benefit of his wife, and the policy was in force at his death. By his will he purported to give the insurance moneys, sufficiently describing the policy to identify it with that in favour of his wife, to his executors to be held in trust by them for the maintenance of his wife as long as she should live; he also gave other property upon the same trust; and directed that, after her death, the residue of his estate should be divided, among certain named persons, none of whom came within the preferred class of the Insurance Act, R.S.O. 1897, ch. 203, sec. 159 (2):—*Held*, that the testator could not make any such disposition of the insurance moneys as he had attempted to do by his will—the trust declared by sec. 159 (1) of the statute not being displaced by an effective declaration under sec. 160; and the wife was, at his death, entitled to receive the insurance moneys.

It was contended that the will raised an election, and that the wife must either allow the insurance moneys to be disposed of as the will directed or lose all benefit under the will:—

Held, that the case fell within the “notable exception” referred to by James, V.-C., in *Wollaston v. King* (1869), L.R. 8 Eq. 165; the testator, having the power to appoint to any within the class of preferred beneficiaries, first gave the insurance moneys in trust for the wife as long as she lived—and then over; that he could not do; and the wife was entitled to the insurance moneys, as well as to the other benefits under the will.

Seemle, that the case would have been different had the insurance moneys been disposed of away from the wife.

Griffith v. Howes (1903), 5 O.L.R. 439, and *In re Anderson's Estate* (1906), 16 Man. L.R. 177, remarked upon and distinguished.

MOTION by the executors of the will of Richard Edwards, deceased, under Con. Rule 938, for an order determining certain questions arising upon the will.

December 5. The motion was heard by RIDDELL, J., in the Weekly Court at Osgoode Hall.

T. D. Delamere, K.C., for the executors.

W. Davidson, K.C., for the infant Norval Craig.

C. S. MacInnes, K.C., for certain charities.

J. R. Meredith, for the widow.

C. G. Jones, for the Inspector of Prisons and Public Charities.

December 7. RIDDELL, J.:—The late Richard Edwards in 1883 insured his life in the London and Lancashire Life Assurance Company, for \$1,000, in favour of his wife Jane Ann Edwards, then and

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now living. This was the only policy ever taken out by him in the said company; and it continued in force until his death, in January of the present year.

By his will, dated the 3rd April, 1909, he made the following provisions:—

“3rd. I give devise and bequeath, to be held in trust (in lieu of dower), all that my freehold, with buildings and appurtenances thereto belonging, known as lot No. 8, an extension of Division street in the city of Kingston, in the county of Frontenac, Province of Ontario.

“4th. I also give devise and bequeath, to be held in trust (in lieu of dower), one thousand dollars life insurance in the London and Lancashire Assurance Company.

“5th. I give devise and bequeath, to be held in trust (in lieu of dower), one thousand dollars life insurance in the Independent Order of Foresters.

“6th. I give devise and bequeath, to be held in trust (in lieu of dower), what money I may have in banks and otherwise possessed of.

“7th. I also give devise and bequeath, to be held in trust (in lieu of dower), any share or shares I may have in any business at the time of my decease.

“8th. One and all of these bequests are to be held in trust by my executors for the maintenance of my wife Jane Ann Edwards as long as she lives. At her death the residue of my estate, after paying funeral expenses, is to be divided as following between the following pro ratio, Mrs. Elizabeth Colquhoun, William Edwards, David Edwards, Ida Edwards, Norval Craig, Orphans’ Home, and General Hospital.

“9th. If Mrs. Elizabeth Colquhoun is dead, her share goes to Mrs. Thomas J. Grigg—if dead, goes to general fund. If David Edwards is dead, his share goes to general fund. If William Edwards is dead, his share goes to Ida Edwards, if she survives him—if not, her share goes to general fund. If Norval Craig is dead, his share goes to his next younger brother.”

None of those taking in remainder comes within the preferred class of the Insurance Act, R.S.O. 1897, ch. 203, sec. 159 (2). The assured, therefore, could not legally make any such disposition of the insurance money as he has attempted to do by his will—the trust declared by sec. 159 (1) of the statute not being displaced by an

effective declaration under sec. 160. The wife was, at his death, entitled to receive the insurance money—to receive it absolutely and at once: *In re Canadian Home Circles* (1907), 14 O.L.R. 322.

The testator, then, has attempted to dispose of property which was his wife's, and over which he had no power of disposition, and by the same will given his wife property to which she had no claim.

From at least as early as 1794, when *Whistler v. Webster* (1794), 2 Ves. Jr. 367, was decided, it has been clear law that "when a person purports under a power of appointment to give property which is the subject of the power to persons who are not objects of the power, that is to say, in fact, to exercise a power which he has not got; that if to the person who would be defeated by that gift, free disposable property belonging to the testator is given by the same instrument, that raises a case of election. . . . When a person coming to claim under an instrument says, if it be a will, 'pay me the legacy,' or 'hand over to me the particular property given to me by that instrument,' the executors have the right to say 'you must conform to all the provisions of the instrument.' And if the instrument also disposes, or purports to dispose, of property which belongs by paramount title to the person claiming under it, a case of election arises, and he cannot take under it the benefit which it gives him unless he is prepared to fulfil the gift which it purports to make of his own property. . . . No one can take under and against the same instrument, but taking under it is bound to fulfil all its provisions:" *per* Kay, J., in *In re Brooksbank* (1886), 34 Ch.D. 160, at pp. 163, 164.

It is argued that the present will raises an election, and that the widow must either allow the insurance money to be disposed of as the will directs or she must lose all benefit under the will.

The case of *Griffith v. Howes* (1903), 5 O.L.R. 439, is cited against this contention. In that case the Chancellor held that a disposition by will of insurance in a benefit society taken payable to the "legal heirs as designated by her will," which gave the insurance money to her executors for the purpose of paying her debts, did not raise an election.

Were the present case on all fours with the case just mentioned, I should, as at present advised, have been unable to follow it—with much respect, I should "deem" that decision "to be wrong;"

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and, even with the stringent rule laid down in *In re Shafer* (1907), 15 O.L.R. 266, at p. 273, I should have thought it necessary to refer the matter to a higher Court for decision under the Ontario Judicature Act, sec. 81.

The case is followed by the full Court of King's Bench in Manitoba in *In re Anderson's Estate* (1906), 16 Man. L.R. 177. There the insurance policy had been made payable to the wife; the will of the insured made other provision for her, and directed that the insurance money should form part of the estate. This is seen to be on all fours with the case in 5 O.L.R. and follows that decision, so that the case in 5 O.L.R. becomes of even higher authority, if possible.

But I do not think the present is covered by either case; and it may be proper to discuss the decisions.

The *Howes* case is rested upon the principle laid down in such cases as *In re Warren's Trusts* (1884), 26 Ch.D. 208, that where the appointment is *ex facie* void, no case of election is raised. In that case a marriage settlement contained a provision that the wife might appoint by will among the issue of the marriage; if no issue, then upon other trusts. The wife appointed in part in favour of the children of a deceased son and in part of another son living, with remainder to his child or children who should attain twenty-one. She also left property of her own to those entitled in default of appointment. It was held that the gift in favour of the children of the living son was void for remoteness, and the question arose whether those entitled in default were put to their election. Pearson, J., said (p. 219): "How can there be any question of election? I must read the will as if the invalid appointment was not in it at all. The ordinary case of election is when a testator attempts to give by his will property which belongs to some one else. Such a gift is not *ex facie* void. In the present case it is the law which disappoints the appointee. The gift is void *ex facie*." But it must be noticed that the gift was void, not because the property did not belong to the appointor, but because, having only a power of appointment in the fund, she attempted to appoint to persons who could take under the appointment and to their children.

In *Wollaston v. King* (1869), L.R. 8 Eq. 165, Sir W. M. James, V.-C., says (p. 173): "The ordinary principle is clear that if a testator gives property by design or mistake which is not his to give, and gives at the same time to the real owner of it other property,

such real owner cannot take both. And the principle has been applied where the first gift is made purporting to be in execution of a power; so that, if under a power to appoint to children, the donee of the power appoints to grandchildren, which is bad, and the children who are entitled to claim by reason of the badness of the appointment also take under the will other property, the grandchildren are entitled to put them to an election. But to this rule, so far as regards appointments, a notable exception is taken, *viz.*, that when there is an appointment to an object of the power, with directions that the same shall be settled, or upon any trust, or subject to any condition, then the appointment is held to be a valid appointment, and the superadded direction, trust, or condition is void, and not only void, but inoperative to raise any case of election." The learned Vice-Chancellor points out that this "notable exception" has been disapproved in Ireland in *Moriarty v. Martin* (1852), 3 Ir. Ch.R. 26; but he considers that the rule is well founded.

I do not do more than refer to the cases upon which *Wollaston v. King* is based—*Carver v. Bowles* (1831), 2 Russ. & Myl. 301; *Woolridge v. Woolridge* (1859), Johns. 63; etc. But *Wollaston v. King* and the other cases are to be found mentioned by Fry, J., in *White v. White* (1882), 22 Ch.D. 555, at p. 559: "In those cases the testator had exceeded the power vested in him by directing that certain property which he had in the first place appointed absolutely to an object of the power, should be held upon trusts or subject to conditions in favour of persons who were not objects of the power.

. . . The question . . . arose whether those gifts to the persons not objects of the power were void, or whether the absolute appointment must be held good and the modifications be rejected, and the conclusion which the Court arrived at was, that as there was an absolute gift to the object of the power, that must prevail, and the modifications which were not valid in law must be rejected; and the moment the Court arrived at that conclusion it was apparent that no case of election arose; because the object of the power is the only person who takes: and there is no conflict between him and a person who is not an object of it. Therefore in those cases the whole question as to election fell to the ground."

It is obvious that it was upon this principle that *In re Warren's Trusts* was decided.

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In re Bradshaw, [1902] 1 Ch. 436, was a case in which the donee of a power to appoint to children appointed to a son for life and remainder upon certain trusts for his children. Kekewich, J., held that a case was made for election. But this has been steadily disapproved. Although Theobald, in the preface to the last edition of his very valuable work on Wills, girds against the cases which conflict with it, it must be considered finally overruled—or at least unless and until the Privy Council or the House of Lords approve it.

The opposite principle is laid down by Farwell, J., in *In re Oliver's Settlement*, [1905] 1 Ch. 191; by Warrington, J., in *In re Beales' Settlement*, [1905] 1 Ch. 256; by Buckley, J., in *In re Wright*, [1906] 2 Ch. 288 (the Court of Appeal in Ireland in *In re Handcock's Trusts* (1889), 23 L.R. Ir. 34, had previously taken the opposite view); and finally by the Court of Appeal in *In re Nash*, [1910] 1 Ch. 1, see pp. 10, 11.

All these are cases of appointment to an object of the power with an attempt to settle the appointed property.

Warrington, J., in *In re Beales' Settlement*, [1905] 1 Ch. 256, at p. 258, points out concisely the distinction—"the proposition that in a case where an appointment fails for remoteness, as distinguished from one in which it fails as being in favour of persons not objects of the power, a case of election is not raised."

The distinction is well drawn in the Irish Court by Naish, L.J., at pp. 46, 47 of 23 L.R. Ir.

While the two cases in Ontario and Manitoba seem to me, with great respect, to fall within the general rule, the present falls within the "notable exception" referred to by James, V.-C., in *Wollaston v. King*. Here the testator had the power to appoint to any within the class of preferred beneficiaries (it turned out that in fact at the time of his death there was only one person, the wife, within that class, but that is immaterial); he first gave and bequeathed the insurance money in trust for the wife as long as she lives—and then over. It seems to me that this is just what the cases say cannot be done, and that not only can it not be done, but the attempt to settle with remainders after the death of the wife does not even raise a case of election. The case would have been, in my view, different, had the insurance money been disposed of away from the wife.

I am of opinion that there is no reason why the widow should not

have the insurance money, as well as the other benefits under the will.

Costs of all parties out of the insurance money.

The provision in sec. 160 that the assured may give the fund "for the benefit of the wife for life, and of the children after her death," etc., has not been overlooked; the power is not to give to the wife for life, unless there be others to take in remainder.

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GORDON V. MOOSE MOUNTAIN MINING CO.

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Timber—Mining Lands—Crown Patent—Reservation of Pine—Right of Patentee to Cut for Certain Purposes—Mines Act, R.S.O. 1897, ch. 36, sec. 39—Repeal by Mines Act, 1906—Statutory Privilege—Saving Clause—Interpretation Act—Rights of Timber Licensee—Excessive Cutting by Patentee—Cutting on one Patented Lot for Use on Another.

Patents were issued to the defendants, under the provisions of the Mines Act, R.S.O. 1897, ch. 36, for certain lands, as mining lands, subject to the reservation to the Crown of all the pine trees on such lands, that reservation being controlled by sec. 39 of the Act, sub-sec. 2 of which provided that the patentees might cut and use such trees as might be necessary for building, fencing, and fuel on the lands so patented, or for any other purpose essential to the working of the mines thereon, and all trees required to be removed in actually clearing the land for cultivation. This Act was repealed by the Mines Act of 1906, 6 Edw. VII. ch. 11, sec. 222, with the proviso that such repeal should not affect any rights acquired or any act or thing done under the Act repealed. In the new Act there was a provision as to reservation of timber, sec. 175, the provisions of which, as regards sub-sec. 2, were not the same as those of sec. 39 of the repealed Act. The Act of 1906 was, in turn, repealed by the Mines Act of 1908, 8 Edw. VII. ch. 21, sec. 193, provisions similar to those of sec. 175 of the Act of 1906 being contained in sec. 112. The plaintiffs were licensees from the Crown with power during 1909 and 1910 to cut and remove pine from the lands patented to the defendants:—

Held, that the defendants, under sec. 39 of the first Act, had legal permission to take such of the trees as were necessary for the buildings and operations in mining, without let or charge, as long as the limits of the permission were not exceeded. That was a specific statutory right or privilege which was saved upon the general repeal of the first Act, having regard to the proviso in sec. 222 of the Act of 1906, enlarged or elucidated by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-sec. 46. The plaintiffs' cause of action against the defendants was, therefore, limited to any excess of cutting by the defendants.

And *held*, that, in the absence of any such provision as is found, in regard to free grant lands, in R.S.O. 1897, ch. 29, sec. 13, sub-sec. 2, the cutting of the defendants was restricted to the particular lot patented—they could not cut on one patented lot pine trees to be used upon another lot also patented to them.

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ACTION for trespass and for damages for cutting and removing timber from lands under license to the plaintiffs.

November 30. The action was tried before BOYD, C., without a jury, at Sudbury.

R. McKay, K.C., for the plaintiffs.

E. D. Armour, K.C., for the defendants.

December 8. BOYD, C.:—The plaintiffs are licensees with power to cut and remove all red and white pine timber upon the locations set forth in the pleadings during the year 1909 and 1910.

The defendants claim to be owners of the same area under different Crown patents of the lands, as mining lands, which are subject to the reservation to the Crown of all the pine trees standing or being on such lands. The patents were issued under the provisions of the Mines Act of 1897 (R.S.O. ch. 36), and the reservation of timber was controlled by sec. 39 of the Act. The first sub-section provides that all the pine, after the patent, is to continue to be the property of Her Majesty, and that licensees empowered to cut timber may enter, cut and remove the trees from the patented property during the continuance of the license. By sub-sec. 2, the patentees may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel; on the lands so patented (*i.e.*, as mining lands), or for any other purpose essential to the working of the mines thereon (*i.e.*, on the land so patented), and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation. By sub-sec. 3, no pine trees, except for the necessary building, fencing, and fuel, or other purpose essential to the working of the mines, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing, and fuel, or other purpose aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw-logs.

The chief matter in dispute arises under the second sub-section, as to the cutting of trees for building, fencing, and fuel, or for any other purpose essential to the working of the mines.

As presented before me the following contentions were urged:—

1. There was no right to cut at all under sec. 39 of the first

Mines Act, because that had been repealed, without saving future cutting by the defendants.

2. That there was no right to cut on one lot for use on another lot, though both patented to the same person in different patents.

3. That the patents might be granted for the purpose of working one large mine, and they are in effect unified by the nature of the operations.

The Mines Act under which the patents granted for mining land were issued was repealed by 6 Edw. VII. ch. 11, sec. 222, with the proviso that such repeal "shall not affect any rights acquired . . . or any act or thing done" under the said Act.

A new provision appears therein as to "Reservation of Timber," in terms embodying the same enactment as sub-sec. 1 of R.S.O. 1897, ch. 36, sec. 39. But as to sub-sec. 2 there is an amendment in the following form, that the patentees of mining lands may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel on the land, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing such part of the land as may be necessary to be used for mining purposes, but subject, as regards pine trees, to paying the value thereof . . . to the licensee. And in case of any dispute between patentee and licensee with regard to the quantity or value of the pine so cut or disposed of, or otherwise regarding such timber, the same may be referred to the Minister of Lands and Mines, whose decision shall be final: 6 Edw. VII. ch. 11, sec. 175.

This Act of 1906 is again altogether repealed by the present Act of 8 Edw. VII. ch. 21, sec. 193, which contains, as sec. 112, provisions similar to, though not in language precisely identical with, sec. 175 of the Act of 1906.

If the first Act of 1897 is repealed by the Act of 1906, and is practically superseded by the present Act of 1908, and no saving clause enures for the advantage of the defendants, the plaintiffs may be in this quandary, that they have no *locus standi* as to the matters complained of, but may have to seek redress by an application to the Minister. If the plaintiffs' contention prevails, they took their licenses of 1909 and 1910 under that change of the law

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which removes the optional character of reference contemplated by the Act of 1906, sec. 175 (2), to the positive enactment that any such dispute shall be determined by the Minister, whose decision shall be final.

The plaintiffs' argument that the Revised Statute has been utterly repealed, and that their right rests entirely on the application of the law as it is found in the Act of 1908, would, if successful, put them out of Court.

The Act referred to in the defendants' patents, and in which sec. 39 is set out at length, was repealed in 1906, with the proviso that the repeal is not to affect any rights acquired under the original Act. That proviso is substantially enlarged or at least elucidated by the safeguard expressed in the general Interpretation Act, as found in the R.S.O. 1897, ch. 1, sec. 8, sub-sec. 50: "The repeal of an Act at any time shall not affect any act done or any right or right of action existing, accruing, accrued or established . . . before the time when such repeal takes effect." And still more explicitly in the last Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-sec. 46: The "repeal . . . (c) shall not affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act . . . so repealed."

Now, what did the patentees of the mining lands obtain or acquire under their patents as to the pine trees on the lands patented? This is the situation: by those patents all the pine is reserved to and continues to be the property of the Crown. Dealing with that reservation, the Crown has granted a timber license to the plaintiffs to cut off and remove all the said pine for the period limited. This, however, is subject to the privilege or right, conferred upon the patentees by the statute, to cut and use such trees as may be necessary for building, fencing, and fuel, or any purpose essential to the working of the mines—and that free of charge and free of the license. This is recognised on the face of the license, which declares that persons going upon the land under lawful authority or title in the location shall not "in any way be interrupted in clearing . . . or in acting or operating otherwise under lawful authority, by the said license." The upshot is, that the patentees, under the statute, sec. 39, had legal permission to take such of the trees as were necessary and essential for the buildings and operations in mining, without let or charge,

so long as the limits of the permission were not exceeded. That is, to my mind, a right or privilege which is saved under the general repeal of the first Act. It is a specific right or privilege, part of the consideration of their purchase, which is secured to them by the statute and was subsisting at the time of its repeal. To use the phrase of the Lord Chancellor in *Blackwood v. London Chartered Bank of Australia* (1874), L.R. 5 P.C. 92, at p. 110, "It was a statutory right, and there is nothing higher among legal rights than a right created by statute." I regard the term of the contract and grant as not in the nature of an inchoate or potential right or privilege, but one which had been established, which had accrued, and was to be acted upon, as occasion arose in the mining operations. I have consulted the following authorities, which mark the distinction and support the conclusion: *In re Chaffers* (1885), 15 Q.B.D. 467, 470; *Prince v. Prince* (1866), L.R. 1 Eq. 490, 494; *Starey v. Graham* (1899), 16 Rep. Pat. Cas. 106, 111; *Abbott v. Minister for Lands*, [1895] A.C. 425; and *Reynolds v. Attorney-General for Nova Scotia*, [1896] A.C. 240. There is an interesting discussion of these two last cases in *Falvey v. Tregoweth* (1897), 16 N.Z.L.R. 341.

The result is, that the plaintiffs have a cause of action as to any excess in cutting which they may establish on the reference to the Master. Enough was admitted to ground a reference as to one class of cutting, which, I think, was unauthorised. That is, the defendants cut on one patented lot pine trees to be used and which were used upon another lot also patented. That is against the fair meaning of the language used in the statute; the leave to cut is for the purpose of building, etc., on the land so patented as mining lands, and also for any other purpose essential to the working of the mine on the land so patented. If it had been meant that the timber from one lot under patent could be transferred to and used upon another lot under patent, that would have been provided for, as we find done in the case of free grant land, the legislation as to which is *in pari materia* with this mines legislation. I refer specially to R.S.O. 1897, ch. 29, sec. 13, which, in sub-sec. 2, provides that the grantee of two or more lots may cut trees for the necessary purpose of building and fencing on any one or more of his lots, and may use what is cut upon one or any of the other lots held by him, whether acquired at the same time

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or otherwise. In the absence of such a provision, the cutting of the patentee is restricted to the particular lot patented. These provisions as to cutting were somewhat considered by me in *Parker v. Maxwell* (1887), 14 O.R. 239. I do not think that the observations as to time, at p. 244, would apply to cutting for the necessary requirements of the mining operations, which would imply a longer continuance than in the case of free grant lands.

The ascertainment of the amount of damages done by cutting should be referred to the Master at Sudbury; further directions and costs reserved till after report.

[DIVISIONAL COURT.]

D. C.
 1910
 Dec. 9.

MANUFACTURERS LUMBER CO. v. PIGEON.

Receiver—Equitable Execution—Fund not Presently Payable—Contract.

Held, reversing the decision of MIDDLETON, J., *ante* 36, upon the facts, that the defendant was not in a position to enforce payment to him of the fund in the hands of the city corporation, and the plaintiffs were in no better position, and were not entitled to have a receiver appointed to receive the fund in equitable execution of their judgment against the defendant.

AN appeal by the defendant (judgment debtor) from the order of MIDDLETON, J., *ante* 36, reversing an order of the local Judge at Stratford, and appointing a receiver by way of equitable execution of the plaintiffs' judgment to reach a fund in the hands of the Corporation of the City of Stratford, in the circumstances mentioned in the report.

November 30. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

R. S. Robertson, for the defendant. The objection to the judgment of the learned Judge below is not so much to the principles laid down by him as to the manner in which they have been applied to the case at bar, which involves an unwarranted interference with the contract between the defendant and the city corporation: *Slein v. Slein* (1903), 7 O.L.R. 67, 70. Under the terms of the contract, the defendant must apply for and obtain the certificate of the city engineer before he can get the money, and he cannot be

compelled to apply for it. He is also obliged to maintain the works in repair for a specified time and to pay for such maintenance, and, if he fails to do so, the corporation may resort to the fund in question. These facts bring the case within *In re Johnson*, [1898] 2 I.R. 551, which, it is submitted, the learned Judge has failed to distinguish from the case now before the Court.

R. T. Harding, for the plaintiffs. The judgment appealed from is conclusive in its statement of the principles bearing upon the question, and their application to the case before the Court. I rely upon the authorities there cited, and also upon those collected in *Holmsted & Langton*, 3rd ed., under Con. Rule 911, at p. 1145 *et seq.* The money has been earned by the defendant, and the effect of the arrangement with the city corporation by which a percentage is retained, is simply to make it a security for the maintenance of the work, and the plaintiffs have a right to any balance that may remain after the security is satisfied.

Robertson, in reply.

December 9. BRITTON, J.:—An application was made by the Manufacturers Lumber Company to the Local Judge at Stratford to continue the appointment of the Sheriff of the County of Perth as receiver of all moneys which may be payable to the debtor Pigeon by the City of Stratford. This application was dismissed, the learned Local Judge giving reasons in writing at length for his decision.

Upon an appeal before Mr. Justice Middleton, whose judgment is reported 22 O.L.R. 36, the decision of the Local Judge was reversed.

Upon a perusal of these judgments, I agree with that of the learned Local Judge. The money in respect to which it is asked to have the receiver appointed is, under the terms of the contract, not yet earned—it may never be earned.

My brother Middleton considered the case of *In re Johnson*, [1898] 2 I.R. 551, as one “nearly approaching” the present, and said that the present case was “very close to the line, and it is hard to say with certainty upon which side it falls.”

With great respect, I think *In re Johnson* governs. The money here cannot be said to be earned—work may be required in regard to maintenance, and maintenance is a part of the contract. I do not regard the contract as to maintenance as collateral to the con-

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struction contract. It is one contract, and under it Pigeon may never be entitled to the money. On principle it seems to me not a case where a receiver should be placed between the original contracting parties.

In my opinion, the appeal should be allowed with costs here and below.

FALCONBRIDGE, C.J.:—I agree.

RIDDELL, J.:—The defendant agreed to enter into a contract to supply and do all that was called for in the specifications, etc., for \$13,600. The work to be done was grading on the streets, which the defendant (Z 21) undertook to maintain in perfect order and in complete repair for 120 months from the date of completion, and also to make good in a permanent manner satisfactory to the engineer, any damage or injury to the works during construction or the period of maintenance.

By H. 12 it was provided that he should keep the pavement and all work in perfectly safe condition and in good repair, at his own expense, until the end of the term of maintenance, "when he is to hand over the same to the city, and every part thereof, in good and serviceable condition and satisfactory in all respects to the city engineer."

This, it seems to me, makes it quite plain that his part of the contract could not be completed until the end of the term of maintenance.

If he does not maintain as he should to the satisfaction of the engineer, the city may do the work, and deduct the cost from any money then due the contractor, or recover it as a civil debt from him or his sureties (Z 21, Z 39, H. 12).

On the completion of the "work" (which here must mean the work originally done) the contractor receives 90 per cent. of the whole amount due under the contract; and at the end of the term of maintenance and after the provisions of the contract have been fully complied with, the final certificate for the balance due (if any) shall be issued and paid to the contractor (Z 30), so that this 10 per cent. does not become payable until the end of the 120 months. It is true that, by furnishing a bond approved by the City Solicitor, the contractor may get this money in advance of the time; but,

unless and until he does so, "the drawback" is kept and it may be so kept until the end of the term of maintenance. He has not furnished this bond—perhaps he cannot—certainly he cannot be forced to do so—even if he were solvent, he might prefer to leave the money at interest with the city.

The law is sufficiently discussed by my learned brother, and no good end could be attained by adding cases.

The appeal should be allowed, with costs in all the Courts.

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FINN V. ST. VINCENT DE PAUL HOSPITAL, BROCKVILLE.

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Gift—Undue Influence—Duress—Absence of Independent Advice—Ante-nuptial Agreement—Statute of Frauds. 

F., being an unmarried man, a Roman Catholic, and an inmate of a hospital governed by members of a Roman Catholic society, and having an insurance of \$1,000 upon his life, payable to his father and brother, a few days before his death declared to the parish priest that he wished the hospital, the defendants, to have the insurance moneys, and that he intended to carry this out by making the plaintiff his wife and appointing her the beneficiary of the policy, she undertaking to pay \$500 to the defendants. The marriage ceremony was performed by the priest; F. made a will in favour of the plaintiff, and designated her as beneficiary under the insurance policy, in lieu of his father and brother. After the marriage, F. stated to the parish priest, in answer to a question put by the latter, in the presence of the plaintiff, that it was his (F.'s) wish and intention that \$500 of the insurance money should go to the plaintiff and \$500 to the hospital, and the plaintiff assented to this. After the death of F., the plaintiff, who was also a Roman Catholic, under pressure from the Mother Superior of the society and the priest, executed an irrevocable power of attorney, in favour of a solicitor, instructed by the Mother Superior; the solicitor collected the insurance moneys and paid \$500 to the plaintiff and \$500 to the defendants, less expenses. The plaintiff had no independent advice, did not know what her rights were, and said that when she was asked to execute the power of attorney she remembered that the priest had told her not to "damn her soul for money" and was "scared."

Held, assuming the existence of an ante-nuptial agreement, that, not being in writing, it was void under sec. 4 of the Statute of Frauds, and the benefit of the appointment in the plaintiff's favour passed to her free from any obligation or trust arising out of the parol agreement. The plaintiff, by executing the power of attorney and acquiescing in her attorney paying half of the insurance moneys to the defendants, made a gift to the defendants; the relations of the parties and the circumstances cast the onus on the defendants of shewing that this gift was the free act of the plaintiff; that onus had not been discharged; on the contrary, the evidence shewed that an undue advantage was taken of the plaintiff's situation; she was not a free agent, and had not that protection to which she was entitled; and, in such circumstances, it was the duty of the Court to afford her such protection by undoing the transaction.

Judgment of the County Court of Leeds and Grenville reversed.

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AN appeal by the plaintiff from the judgment of the County Court of Leeds and Grenville of the 23rd January, 1910, in favour of the defendants in an action brought by Mary Josephine Finn, widow and executrix of Paschal Finn, deceased, against the hospital corporation, Sister Mary Clement (Mother Superior in charge), and James Henry Botsford, a solicitor, to recover \$500, part of an insurance on the life of Paschal Finn, which, as the plaintiff alleged, was paid to the defendant Botsford by the insurers, and by him paid to the hospital, through a power of attorney obtained from the plaintiff by the undue influence of the defendants and others.

November 7. The appeal was heard by a Divisional Court composed of MULLOCK, C.J. Ex. D., CLUTE and SUTHERLAND, JJ.

E. G. Porter, K.C., for the plaintiff. There was no ante-nuptial agreement, but, even if there was, it was not binding on the plaintiff, and she had no advice as to her right to disregard it. If there was such an agreement, it was made between the plaintiff and her intended husband, and the hospital were not parties to it. No consideration passed from the hospital. It was such a bargain as could not be enforced by the hospital, and the plaintiff could revoke it at any time: *Anson's Law of Contract*, 8th ed., pp. 25, 26, and 27; *Price v. Easton* (1833), 4 B. & Ad. 433; *Pollock, Principles of Contract*, Bl. ed., p. 262. The gift of the \$500 to the hospital was not voluntary, but was made under undue influence, without independent advice, and was an improvident one: *Parfitt v. Lawless* (1872), 41 L.J.P. & M. 68; *Rhodes v. Bate* (1865), L.R. 1 Ch. 252; *Morley v. Loughnan*, [1893] 1 Ch. 736; *Clarke v. Hawke* (1865), 11 Gr. 527; *Aylesford v. Morris* (1873), L.R. 8 Ch. 484, at p. 490; *Allcard v. Skinner* (1887), 36 Ch. D. 145, at pp. 154 and 159. The defendants have not discharged the onus which is upon them of shewing that the transaction was a free act of the plaintiff. Even if the plaintiff knew and understood what she was doing when she signed the power of attorney, yet her consent was obtained by pressure of those who stood in such a relation to her that they could exercise undue influence over her, and that suffices to nullify the transaction in such a case: *Bentley v. Mackay* (1862), 31 Beav. 143; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Huguenin v. Baseley* (1807), 14 Ves.

273, at pp. 289, 299, and 300. Before the money was paid over by Botsford, the plaintiff repudiated the gift.

J. A. Hutcheson, K.C., for the defendants. The outstanding fact is that there was an ante-nuptial agreement between the plaintiff and Paschal Finn, whereby the plaintiff became liable to the hospital for \$500, or took the insurance certificate in trust as to \$500, part thereof, for the hospital. There was good consideration for the plaintiff's promise to pay the hospital the money, in the promise of Finn to marry her, and make her sole beneficiary. A wife may assign her rights under an insurance policy, even during the lifetime of her husband: *Graham v. Canada Life Assurance Co.* (1894), 24 O.R. 607, at pp. 612 and 613. And she can do the same in pursuance of an agreement with her husband: *Re Kemp* (1907), 15 O.L.R. 339. The general rule is that a stranger to a contract cannot enforce it, but there are exceptions, as where the third party is a *cestui que trust*, and the trustee refuses to enforce it: *Godefroi on Trusts and Trustees*, 3rd ed., pp. 117, 118, 119; *Gregory v. Williams* (1817), 3 Mer. 582; *Gandy v. Gandy* (1885), 30 Ch. D. 57, at p. 68; *Seagrave v. Seagrave* (1807), 13 Ves. 439, at p. 440. A parol declaration of trust of chattels personal is good: *Lewin's Law of Trusts*, 10th ed., p. 53; *Caldwell v. Dawson* (1850), 14 Jur. 316; *Kilpin v. Kilpin* (1833), 1 My. & K. 520, at pp. 538, 539. The plaintiff knew what she was doing throughout, and there was no undue influence used upon her.

Porter, in reply.

December 10. The judgment of the Court was delivered by MULLOCK, C.J.:—This is an appeal from the judgment of His Honour the Junior Judge of the County Court of Leeds and Grenville, dismissing the plaintiff's action.

The action was brought by Mary Josephine Finn, widow and executrix of Paschal Finn, deceased, to recover from the defendants the sum of \$500, being part of the sum of \$1,000 payable to her under a benefit certificate or policy issued by the Catholic Order of Foresters, on the life of her deceased husband, Paschal Finn.

The certificate, when first issued, named the father and brother of the deceased (who was then an unmarried man) as the beneficiaries thereunder.

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The defendants say that the plaintiff agreed with Finn that, in consideration of his marrying her and appointing her sole beneficiary, she would, on his death, pay to the hospital \$500, being one-half of the said \$1,000.

The plaintiff denies such agreement, and the evidence on the point is most conflicting. The evidence shews that for some years prior to his death the deceased was in feeble health, and resided in the hospital as a non-paying patient, operating their elevator without remuneration. It is clear from the dealings of the parties that it was never intended that the deceased should pay for his maintenance, or be paid for his services. The benefit certificate was in the keeping of Sister Mary Clement, Mother Superior of the hospital.

The plaintiff had been suffering from rheumatism for six or seven years, during the greater part of which time she had been a paid employee and inmate of the hospital.

For the defence the case is sought to be made that for some time before his death it was the wish of Paschal Finn that the hospital should receive the benefit of the certificate; that he had been advised that the only way whereby he could accomplish this end would be by getting married, and appointing his wife as sole beneficiary and arranging with her that the hospital should benefit under the certificate; and that the deceased married the plaintiff on the understanding that she would, out of the proceeds of the certificate, pay to the hospital \$500.

The plaintiff denies any such understanding.

Both parties were Roman Catholics, and the marriage ceremony was performed on the morning of the 25th January, 1909, by the Very Rev. Dean Murray, parish priest, at the hospital, the deceased at the time being very ill and confined to his bed. The same day Mr. Boyd, financial secretary of the Order, obtained the certificate from its custodian, the Mother Superior, and had the same changed in favour of the plaintiff as sole beneficiary. At about two o'clock of the morning of Thursday the 28th January, Paschal Finn died, in the presence of his wife, who had been continually present with him for the two preceding nights. After his death she remained in the room until about eight o'clock in the morning. Upon leaving the room she met the Mother Superior, who asked her if she wished to see Dean Murray. The plaintiff

said she did, and went with the Mother Superior into the room where Dean Murray was.

In explanation of what Dean Murray then stated to the plaintiff, it appears from his evidence that a few days before the marriage he was sent for to visit the deceased, and the Dean stated in his evidence that in his interview with Finn the latter said that he wished to pay "his lawful debts;" that he had a policy of insurance which he wished to leave to the hospital, but he could not unless he made some one his wife, and he declared to him then that Mary Weatherspoon was willing to become his wife, on her receiving \$500 from the insurance policy for herself and \$500 to go to the hospital. Dean Murray further said: "I listened to what he had to say, and I told him then when he asked me to marry him, I told him it was rather a request out of the ordinary, and I would like some time to consider it, and I considered the matter, and I did not like the looks of it. It had a commercial look, and I did not care much for performing the ceremony, but, after due consideration, I had to come to the conclusion that, as he had a right to marry, it was my duty to marry him if he so desired." He further stated that "after the marriage ceremony and after the witnesses had left the room, I closed the door and I stood by Paschal Finn's bedside, and, his wife standing near me, I said, 'I understand it is your wish and intention that \$500 of your insurance money goes to your wife and \$500 to the hospital?' He answered 'yes,' and I turned to his wife and said, 'You understand what is to be done?' and she said 'yes.' I did not see Paschal Finn any more."

Dean Murray also swore that he understood the plaintiff was in fear of her brother, and he says that, when Mrs. Finn came into his room on the morning of her husband's death, he told her it would be well for her to secure legal advice to protect her own interests, and suggested the name of Mr. Botsford, a Brockville lawyer. The following are extracts from his examination:—

"12. Q. Was anything repeated as to what had occurred that Mrs. Finn was fearful of after he came into the room? A. Yes. I said, 'I understand you are afraid of your brothers,' and I advised her to secure legal advice for her own protection.

"13. Q. There was something then said about the hospital? A. I think Mrs. Finn thanked me and made some remark about

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being good to the hospital. I said, 'Mary, do your duty, and do not damn your soul for money,' and then I left the room, and that is all I know about the matter."

The Mother Superior remained in the room during this interview between Dean Murray and the plaintiff. The plaintiff's account of this interview does not differ materially from that of Dean Murray. According to the plaintiff's evidence, she then left the room, went to the top floor of the hospital, and saw Mr. Boyd, the financial secretary, and told him, "They want me to have Mr. Botsford," when Mr. Boyd said it was not necessary to have any lawyer until the cheque came. On going downstairs, the plaintiff again encountered the Mother Superior, and told her what Mr. Boyd had said, when the Mother Superior said, "I had to do what Dean Murray said," and took the plaintiff into her office and telephoned for Mr. Botsford, who arrived at about ten o'clock. Whilst awaiting his arrival, the plaintiff manifested a desire to go home, when the Mother Superior, according to the plaintiff's evidence, asked her to stay, saying, "Oh, Mary, he will not be long now."

The plaintiff had never had any business dealings with Mr. Botsford; did not, in fact, know him. On arriving, he entered into conversation with the Mother Superior, the plaintiff hearing a portion only of the conversation. She states that the Mother Superior told Mr. Botsford it was a lawful debt. After the conversation with the Mother Superior, Botsford wrote an irrevocable power of attorney, whereby the plaintiff empowered him to collect the \$1,000, and to give one-half thereof to the hospital. The plaintiff, in her examination, said that Botsford read the paper to her, but that she did not understand what he was reading; that she was ill and tired out, having had no sleep for two nights; and that the words of Dean Murray, not to damn her soul for a few hundred dollars, scared her, and that she thought it would damn her soul if she did not give them a few hundred dollars; that the Mother Superior told her it was Finn's lawful debt, and to sign it (meaning the power of attorney); that she signed it not knowing its nature; that, if she had known she was giving away one-half of the money, she would not have signed it.

On cross-examination she admitted that from what occurred when Mr. Botsford was at the hospital she knew that she was

signing away \$500, but denies having ever agreed to any such division. She further swore that she objected to signing the paper, and that Mr. Botsford said, "Oh, yes, you had better sign it."

It appears from the evidence that after the marriage the plaintiff informed her brother, John Edwin Weatherspoon, that her husband wished him to bring to the deceased a lawyer for the purpose of preparing his will in order to protect the plaintiff, and that he made this wish known to Mr. Deacon, whereupon the latter, together with the plaintiff's brother and a Mr. McGowan, went to the hospital, and the three of them, together with the plaintiff, went into the room of the deceased, when Mr. Deacon, on instructions from Finn, and in the presence of the plaintiff, prepared a will whereby the testator bequeathed his whole estate to the plaintiff and appointed her sole executrix.

Sister Mary Clement, the Mother Superior, swore that she heard from one of the sisters that these men had been in Finn's room, and had got him to sign some document, and inquired of the plaintiff if such were true, when the plaintiff said "that it was; that her brother and Mr. Deacon were there, and they got Paschal to sign a paper, and I said to her, 'What was the nature of the paper?' She said, 'I do not know' . . . and I said, 'You do not know what he signed?' and she said, 'No, I do not,' but she said, 'I fear that it was something that my brother Don (John) has got Paschal to sign, that will give him some power over the money, over my money, and I do not know just what to do,' so I said to Mary, 'Perhaps we had better tell Father Murray.' She said, 'Very well.' She expressed her fear of John getting the money."

The witness further added that she reported the matter to Dean Murray, and, at his instance, she then called the plaintiff into Dean Murray's room. This meeting took place on the morning of Finn's death, but Dean Murray does not say that the plaintiff expressed to him any fears at the hands of her brother, but that he said to her, " 'I understand you are afraid of your brother,' and I advised her to secure legal advice for her own protection."

"13. Q. There was something then said about the hospital? A. I think Mrs. Finn thanked me and made some remark about being good to the hospital. I said, 'Mary, do your duty, and don't damn your soul for money,' and then I left the room."

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The Mother Superior also swore that, when the deceased first came to the hospital to remain, he gave her to understand that he intended to leave the insurance to the hospital, which he regarded as his home; that, on the witness and the plaintiff leaving Dean Murray's room after Paschal Finn's death, the plaintiff said to the Mother Superior, "I had better go home," when she answered, "Don't you think we had better do as Father Murray suggested?"

"26. Q. Did she make any objection to sending for Mr. Botsford? A. None whatever."

The Mother Superior's account of what she stated to Mr. Botsford on his arrival is as follows:—

"I told Mr. Botsford of Paschal Finn being a patient in the hospital for a number of years, having no means; that we had cared for him, providing him in every way; that he had an insurance policy with the Catholic Order of Foresters, and that it had been his wish to leave this money to the hospital; that, finding out, later on, that the rules of the Order would not allow him to do this, it had been troubling him; that on the Monday previous he had married Mary Weatherspoon; that he intended that she should give \$500 to the hospital and retain \$500 for herself, and I related to him what Mrs. Finn had told me with regard to her brother and Mr. Deacon coming to the hospital getting Paschal to sign a paper without reading it to Paschal or without her knowledge of what it contained; that she had expressed fears to me and to Father Murray that her brother John had been trying to get hold of her money; and that Father Murray had advised her to send for a lawyer and to give her business in his hands, and that he would protect her rights, and that on the strength of that we had sent for him, Mr. Botsford."

"30. Q. Then what next? A. Then Mr. Botsford proceeded to draw up a document, a paper. He read the paper, after writing it, in my presence, to Mrs. Finn. He asked her if she understood it. She answered that she did, and she signed the document in my presence, and in the presence of Dr. Carron, who acted as a witness."

She swore also that she said nothing to induce the plaintiff to sign the power of attorney, and that she did not object to doing so. The Mother Superior also stated that the plaintiff raised no objection to signing the power of attorney; that the suggestion

for it did not come from the plaintiff, and to the question, "But she did it upon the suggestion of Father Murray and yourself," she answered, "Because she had expressed her fear of her brother."

"53. Q. What she did, she did upon the suggestion of Father Murray and yourself? A. Yes, sir.

"54. Q. There is no question about that, is there? A. No.

"55. Q. Have you any doubt that she would not have signed the paper only for the suggestion of yourself and Father Murray? You have no reason to think that she would have signed the paper if you and Father Murray had not suggested it? A. She would not have had an opportunity at that time.

"56. Q. Did you explain to her that she was under no legal obligation to do that? A. No, I did not.

"57. Q. Did you tell her that she was under no moral obligation to do it? A. I did not say anything to her about it.

"59. Q. All you said was she had better do what Father Murray suggested? A. Yes.

"60. Q. And Dean Murray had suggested—you knew he had suggested—that she should not damn her soul for money? A. I heard him say that.

"61. Q. You heard him say that? A. He said, 'Do your duty.'

"62. Q. And that was part of her duty as you considered it? A. A part of her duty.

"63. Q. A part of her duty, as you considered it, was to give half of this money to the hospital? A. Yes.

"64. Q. And Father Murray considered it the same? A. Yes.

"65. Q. In fact, you so expressed yourselves, did you not? A. Yes.

"66. Q. Mrs. Finn did not request you to employ Mr. Botsford? That was the suggestion of Dean Murray? A. Yes, sir.

"68. Then it was not upon Mrs. Finn's invitation or upon her retainer that Mr. Botsford came there at all? A. It was in the interests of Mrs. Finn.

"71. Q. When he came there the instructions that he got he got from you? A. The explanation he received came from me.

"72. Q. Whatever was told him, was told by you? A. Yes.

"73. Q. Mrs. Finn took no part in that conversation? A. She listened.

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"74. Q. She took no part in it? A. No.

"75. Q. She simply sat there mute—is that the case? Or walked about the room? A. She may have; I do not remember.

"100. Q. What was the great hurry or haste about this matter to get it right within a few hours after the man had died. A. Simply on the strength of what Mrs. Finn had told me about her fears concerning her brother getting her money.

"101. Q. And, for fear her brother or some person else would get it, you wanted to nail the hospital end of it right there and then? A. I had only Mrs. Finn's interest in view.

"102. Q. You were getting one-half of her money for the hospital? A. It did not occur to me that there was any danger of the part that was to be assigned to the hospital.

"103. Q. Did you think there was any danger of her brother getting the money? A. I thought there might be danger of her brother getting her \$500.

"104. Q. She was getting the whole of it, wasn't she? A. The cheque was——

"105. Q. Under the policy she would get the whole of it and you were trusting to get your \$500 from her? A. I did not think of that at all.

"106. Q. You did not consider that possible at all? A. No.

"107. Q. You were simply afraid that her brother was getting one-half of it? A. I was afraid her brother was taking some means to get possession of the money that was coming to her.

"108. Q. The \$1,000 or the \$500. A. The \$500.

"109. Q. And so what you were anxious to do was to protect Mary so that she would get her \$500? A. Yes."

I am unable to reconcile this statement of the Mother Superior with the part which she took in this transaction. Her instructions to Botsford shew that her object was to secure the \$500 for the hospital, not to protect the plaintiff in respect of the other \$500. It is strange, if her sole object was to protect the plaintiff in respect of the \$500 to be retained by her, that this apparently meritorious object was never mentioned to the plaintiff or to Mr. Botsford.

Mr. Botsford, in his evidence, stated that, after receiving explanations from the Mother Superior, he turned to the plaintiff and said: "I think the best thing for you to do would be for you

to give me a power of attorney to collect that \$1,000 in the Foresters for you, and when I get it I will give the hospital their \$500 and see that you get your \$500;" and she said "Very well;" and, further on, "There was tacit acquiescence on her part."

He further swore that when the Mother Superior left the room the plaintiff stated that she thought the hospital might be satisfied with \$200, and he answered: "Mrs. Finn, I do not know anything about that, what the hospital should be satisfied with, but I presume I am here to carry out the intentions as expressed to me by Superior, Paschal Finn's intentions. Is not that your wish? She said, 'Oh, I suppose so, but I would not want to go through this thing again for a couple of thousand dollars, they are raising such a fuss with me at home.' I then finished writing out the power of attorney, and read it over to her and explained its meaning."

Mr. Botsford further stated that he did not charge the plaintiff for his services, nor did she agree to pay him therefor; that he knew she was under no legal obligation to give the hospital the money, but that he did not so advise her, and he says, "I gave her no advice at all"—except that he told her the best thing she could do was to sign the power of attorney to enable her to give one-half of the money to the hospital, and that she acted upon his word or suggestion.

It is singular that, if the Mother Superior's sole object in procuring the execution of the irrevocable power of attorney was to protect the plaintiff in respect of her half of the \$1,000, Mr. Botsford should have given her to understand that the object of her signing the power of attorney was to enable her to give the money to the hospital.

By virtue of this power of attorney, Mr. Botsford subsequently collected the \$1,000 and paid \$500 thereof to the plaintiff, and, with the consent of the hospital authorities, deducted from the remaining \$500 certain disbursements, including his own professional charges, and paid over the balance to the hospital.

For the defendants it was argued that, by reason of the alleged parol ante-nuptial agreement between the plaintiff and Paschal Finn, the plaintiff became legally liable to the hospital in the sum of \$500, or took the certificate in trust as to the \$500, part thereof, for the hospital. Such, however, was not, in my opinion.

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her position. For, assuming that such ante-nuptial agreement existed, being by parol it was void under the 4th section of the Statute of Frauds, which enacts that "No action shall be brought to charge any person upon any agreement made upon consideration of marriage unless the agreement shall be in writing and signed by the party to be charged therewith."

In *Warden v. Jones* (1857,) 23 Beav. 487, prior to his marriage, the husband entered into a parol contract to settle his intended wife's property, but the settlement was not effected until after the marriage. At the suit of the husband's creditors, it was held that, as against them, she had no equity to the settlement, and that the post-nuptial settlement was void, her property having on marriage passed to her husband, and as such become exigible at the instance of his creditors.

So here, even if the husband appointed to his wife in pursuance of any parol ante-nuptial agreement, the benefit of such appointment passed to her free from any obligation or trust arising out of such parol agreement.

If this be the correct view of the plaintiff's position, then what she did was to make a gift to the hospital of \$500. This gift she attacks, and the rules applicable to the question thus raised are to be found in many authorities.

For example, in *Hoghton v. Hoghton*, 15 Beav. 278, it is stated (pp. 298, 299), "that wherever one person obtains, by voluntary donation, a large pecuniary benefit from another, the burthen of proving that the transaction is righteous, to use the expression of Lord Eldon, in *Gibson v. Jeyes* (1801), 6 Ves. 266, falls on the person taking the benefit. But this proof is given, if it be shewn that the donor knew and understood what it was that he was doing. If, however, besides the obtaining the benefit of this voluntary gift from the donor, the donor and donee were so situated towards each other, that undue influence might have been exercised by the donee over the donor, then a new consideration is added, and the question is not, to use the words of Lord Eldon, in *Huguenin v. Baseley*, 14 Ves. 273, 300, 'whether the donor knew what he was doing, but how the intention was produced;' and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside. In many cases, the Court, from

the relations existing between the parties to the transaction, infers the probability of such undue influence having been exerted. These are cases of guardian and ward, of solicitor and client, spiritual instructor and pupil, medical adviser and patient, and the like; and, in such cases, the Court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining, that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit."

In *Hobday v. Peters* (1860), 28 Beav. 349, Sir John Romilly, Master of the Rolls, says, at p. 351: "I think the evil would be very considerable, and the rule of the Court frittered away by technicality, if it were held, that this particular relation must be one which the Court designates by a particular name, such as that of trustee and *cestui que trust*, guardian and ward, solicitor and client, or physician and patient."

So in *Billage v. Southee* (1852), 9 Hare 534, where Lord Justice Turner, then Vice-Chancellor, at p. 540, says: "No part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction of the Court cannot be too freely applied, either as to the persons between whom, or the circumstances in which it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustee and *cestui que trust*—guardian and ward—attorney and client—surgeon and patient—to be merely instances of the application of the principle. . . . It is said, that he intended to be liberal, and that this Court would not prevent him from being so: and no doubt it would not if such were his intention; but intention imports knowledge, and liberality imports the absence of influence; and I see no evidence in this case either of knowledge or of the absence of influence: and where a gift is set up between parties standing in a confidential relation, the onus

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of establishing it by proof rests upon the party who has received the gift."

In *Cooke v. Lamotte*(1851), 15 Beav. 234, Sir John Romilly, Master of the Rolls, at pp. 240, 241, says: "In every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary that he should be able to establish, that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing: and if this be not done, the transaction cannot stand." And at pp. 239, 240, he states the rule in the following language: "Where those relations exist, by means of which a person is able to exercise a dominion over another, the Court will annul a transaction, under which a person possessing that power takes a benefit, unless he can shew that the transaction was a righteous one. . . . That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated, that one may obtain considerable influence over the other. . . . It is essential, in every such case, if the transaction should be afterwards questioned, that he" (donee) "should prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect."

Nor are the rules confined to cases of gifts only. In *Holman v. Loynes* (1854), 4 DeG. M. & G. 270, Lord Justice Turner, at p. 283, says: "I see no reason why the rule which applies to gifts, should not equally in this respect apply to purchases. It is true that the rules of the Court against gifts are absolute, and that against purchases they are modified; but this is a question, not upon the extent of the rules, but upon the circumstances under which they are to be brought into operation, and in that respect I see no difference between the cases of gifts and purchases."

Referring to this view, Mowat, V.-C., in *Clarke v. Hawke*, 11 Gr. 527, 553, says: "In the case of sales and the like, the absence of influence is presumed, where the transactions are, in view of the real facts, fair and equal, and for adequate consideration. The case of gifts, of course, admits of no like modification of the rules referred to. In applying to the present case the principles illustrated by all these decisions, it is proper to bear in mind, that a lady stands more in need of protection than a man, under like circumstances."

So where a person has recently come into property as devisee, legatee, etc., and has disposed of it for an inadequate consideration and without proper advice, Courts of Equity have set aside such transactions, even though there was absence of fraud. Referring to a case of this kind Lord Kenyon, in *Evans v. Llewellyn* (1787), 1 Cox Eq. 333, 340, says: "Here, I say, the party was taken by surprise; he had not sufficient time to act with caution; and therefore though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation. The cases of infants dealing with guardians, of sons with fathers, all proceed on the same general principle, and establish this, that if the party is in a situation, in which he is not a free agent, and is not equal to protecting himself, this Court will protect him. I do not know that the Court has drawn any line in this case, or said thus far we will go and no further; it is sufficient for me to see that the party had not the protection he ought to have had, and therefore the Court will harrow up the agreement. I am of opinion, in this case, the party was not competent to protect himself, and therefore this Court is bound to afford him such protection; and therefore these deeds ought to be set aside, as being improvidently obtained."

So in *Allcard v. Skinner*, 36 Ch.D. 145, where Cotton, L.J., says (p. 171): "The decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside . . . may be divided into two classes—First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor." And further on he says: "In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. . . . In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

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So, even between employer and employees, the relationship of master and servant may give rise to the application of the principles thus referred to. In *Hunter v. Atkins* (1832), 3 Myl. & K. 113, Lord Brougham, at p. 140, says: "Where the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired."

In *McCaffrey v. McCaffrey* (1891), 18 A.R. 599, Maclellan, J.A., after referring with approval to the language of Cotton, L.J., in *Allcard v. Skinner*, ante, says (p. 601): "At pp. 181 and 182 Lindley, L.J., discusses the principle and expresses the opinion that the doctrine of the Court is founded on this, that it is expedient and right to save persons from being victimised by other people, and not merely to save them from the consequences of their own folly. He then goes on to point out that the doctrine of the Court has grown out of the necessity of grappling with the infinite varieties of fraud; that gifts are set aside without proof of the actual exercise of influence, on the ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and failing that proof, have set aside gifts otherwise unimpeachable."

So, again, in *Rhodes v. Bates*, L.R. 1 Ch. 252, at p. 257, where Lord Justice Turner says: "I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

Dealing, then, with this case, the question is whether, having regard to the principles laid down in the foregoing cases, the plaintiff is entitled to a return of the \$500.

For many years she had, as patient and employee, resided in the hospital, which was under the control of the Roman Catholic Church. The Mother Superior had been the custodian of the insurance certificate, parting with it only on the day of the marriage

in order to enable it to be changed in the plaintiff's favour. Finn was dying, and the Mother Superior appears to have manifested much interest in the destination of the money. On learning that some persons, including the plaintiff's brother, had obtained Finn's signature to a paper, she reported the matter to Dean Murray, adding that the plaintiff had told her that she feared the paper was against her interest. As the plaintiff was present when this paper (her husband's will) was prepared and executed and knew that it was in her favour, it is quite clear that she did not in fact entertain any apprehension that the paper would prejudicially affect her interests. For two nights in succession the plaintiff had watched over her dying husband, was present at his death (2 a.m.), and remained in his room until about 8 a.m., when the Mother Superior telephoned to her to come to Dean Murray's room. This she did, the Mother Superior accompanying her. Thereupon the Dean observed that he had heard that she feared her brother, and said, "Mary, do your duty, don't damn your soul for money," and advised her to engage Mr. Botsford. Dean Murray then withdrew, when the plaintiff expressed a desire to go home, but the Mother Superior urged her to remain and send for Mr. Botsford, as the Dean had suggested. The two then proceeded to the room of the Mother Superior, when the latter telephoned for Mr. Botsford. That gentleman did not come until about 10 o'clock. In the meantime the plaintiff was restless and anxious to go home, but, in deference to the wishes of the Mother Superior, she remained. When Mr. Botsford arrived, the Mother Superior engaged him in conversation and gave him his instructions. He received no instructions from the plaintiff, but proceeded to draw the irrevocable power of attorney, practically without consulting her. He was not acting as her solicitor, and gave her no advice. She says that she remembered the words of Dean Murray not to damn her soul for money, and that she was scared, and under these circumstances executed the power of attorney. The Mother Superior having temporarily withdrawn from the room, the plaintiff, according to Mr. Botsford's evidence, expressed the view that \$200 ought to satisfy the hospital; he answered: "Mrs. Finn, I do not know anything about that, what the hospital should be satisfied with, but I presume I am here to carry out the intentions as expressed to me by Superior, Paschal Finn's intentions;" and

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further stated that he gave her no advice except that he told her the best thing she could do was to sign the power of attorney to enable her to give one-half of the money to the hospital, and she acted on his word or suggestion.

The plaintiff was not advised as to her rights. The Mother Superior, knowing what Dean Murray has said to the plaintiff, urged her to do what Dean Murray had suggested. The impeached transaction occurred in the hospital after the plaintiff had been without sleep for two nights, watching her dying husband, under the pressure of the language addressed to her by Dean Murray and the Mother Superior, and when for the time being she appears to have yielded to their influence over her—it is impossible to say that the gift was spontaneous.

Nor would I think the transaction would be less open to objection even if the alleged ante-nuptial parol agreement were clearly established. It was not legally binding upon the plaintiff, and she had no advice as to her being entitled to disregard it.

I am unable to attach any weight to the Mother Superior's contention that the transaction was intended merely for the protection of the plaintiff against her brother. Dean Murray's injunction to her had reference only to the \$500 which the hospital was anxious to obtain, and Mr. Botsford's evidence is open to the one construction only, that he was endeavouring to secure that sum for the hospital. At the interview when Mr. Botsford drew the power of attorney, no reference whatever appears to have been made to the alleged danger to the plaintiff at the hands of her brother. Nor am I able to discover anything in the transaction which is in the plaintiff's interest.

In the presence of the Mother Superior, the plaintiff appeared unable to offer any resistance; but in her absence she did raise some feeble objection, which was overborne by Mr. Botsford, who, in his evidence, stated that the plaintiff signed the power of attorney on his suggestion, he being then in fact solicitor for the hospital.

The undue haste that characterised the transaction is open to the inference that the Mother Superior feared that, freed from the influence of the hospital environment, the plaintiff might be unwilling to give the money to the hospital.

The relations of the parties and the circumstances of the case cast the onus on the defendants of shewing that the transaction

was the free act of the plaintiff. That onus has not been discharged. On the contrary, the evidence shews that an undue advantage was taken of the plaintiff's situation. Unassisted she was unable to resist the influence of those who, on behalf of the hospital, were exercising pressure upon her. She was not a free agent, and had not that protection to which she was entitled before parting with her rights. Under such circumstances it is the duty of the Court to afford her such protection by undoing the transaction.

I, therefore, am of opinion that the judgment appealed from should be set aside, and that the plaintiff is entitled to recover the money, with interest, and to the costs of the action and of this appeal.

[DIVISIONAL COURT.]

DEVLIN v. RADKEY.

Vendor and Purchaser—Contract for Sale of Land—Possession Taken by Purchaser—Vendor without Patent for Land—Time of Essence of Contract—Purchaser Failing to Make Payments—Judgment by Default for Possession—Setting aside, on Payment into Court of Balance of Purchase-money—Vendor Treating Contract as Subsisting—Waiver—Improvements Made by Purchaser—Right to Patent—Appeal from Judgment at Trial—Compliance with Terms—Explanation—Right of Appeal—Right of Purchaser to Compel Performance of Contract—Payment out of Court—Costs.

On the 17th January, 1906, the plaintiff entered into a written agreement with the defendants for the sale to them of land described, for \$600, payable \$100 in cash and the remainder in deferred instalments, the last being due on the 15th January, 1908, with interest. The defendants agreed to pay the purchase-money, and the plaintiff covenanted to convey to them "by a good and sufficient deed, Crown land assignment, all her interest" in the land; and it was "expressly understood that time is to be considered the essence of this agreement, and, unless the payments are punctually made at the time and in the manner above-mentioned, the said party of the first part is to be at liberty to resell the said lands." One of the defendants, R., went into possession and made improvements of a permanent value. The other defendant assigned his interest under the contract to R. The payments (except the cash payment) were not made in accordance with the terms of the contract, but R. paid at different times various sums amounting to \$320, the last payment being made on the 5th March, 1907. At the time the contract was entered into, R. believed that the plaintiff had obtained a patent for the land, and that she intended to sell the fee simple; but in fact she had no patent. In March, 1907, R. had made permanent improvements to the amount of \$300 in buildings and \$40 in clearing land. After he had made a payment in that month, he found that the plaintiff had not the patent, and he attempted to be located for the land himself; he stopped payment of

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any further amount to the plaintiff, because she had not the patent. He went on improving the land by clearing to the additional value of \$280. A patent for the land was issued to the plaintiff in 1908. On the 19th December, 1908, the plaintiff began this action for possession of the land and other relief. On the 19th February, 1909, upon a summary application by the plaintiff, R. not appearing, judgment for possession of the land was granted. In the plaintiff's affidavit in support of this application she swore that there was due and owing to her under the agreement, \$470.70, and that she desired to restrain R. from cutting and selling wood; she did not assert that the contract was rescinded. On the 27th April, 1909, the judgment was, by order made on the application of R., vacated, upon R. paying \$470.70 into Court, which he did, and he was allowed to remain in possession until the determination of the action. Nothing further was done in the action until the 9th May, 1910, when the statement of claim was delivered. In the meantime, on the 26th February, 1910, the Attorney-General brought an action against the plaintiff for the cancellation of the patent, the result of which was that the patent was set aside, but with the understanding that when the improvements were completed a new patent would issue. At the trial the plaintiff insisted that the contract was at an end, and that she was entitled to possession of the land as improved by R.:—

Held, that the position taken by the plaintiff upon the motion to set aside the judgment, when she asserted that a certain amount was due under the contract, which amount was paid into Court, was inconsistent with that taken at the trial; and, having regard to the non-observance of the time clause in respect of payments subsequent to the first; to the fact that R. entered into possession and continued in possession and made improvements during the period when the time clause was disregarded; to the further fact that the plaintiff continued to treat the agreement as subsisting and claimed the balance due thereon; that the delay was partly due to the want of title and the proceedings taken by the Attorney-General; that R., in the *bonâ fide* belief that he was the true owner, continued to make improvements after the default judgment had been set aside—and having regard to all the facts and circumstances of the case—the only fair inference was that neither party regarded time as of the essence of the contract, but that both parties treated the time clause as having been waived; and that the plaintiff ought not to be heard at once to affirm the contract, with a view of compelling the defendant to pay into Court the full balance of the purchase-money, and at the trial, when the money was in Court, to take the position that the agreement had been rescinded.

Time, though of the essence of the original agreement, may be waived by a subsequent agreement or by conduct of the parties amounting to waiver; and insisting on the contract after the time limited for completion is an act waiving the right to insist on that time as essential.

By the judgment of the trial Judge, the plaintiff was to have possession, upon the money paid on the contract being returned to R. with interest. R.'s solicitor received from the plaintiff's solicitors a cheque for the amount paid with interest; and upon this the judgment was entered. R.'s solicitor, by an uncontradicted affidavit, explained that the cheque was given and received merely in order to have the judgment entered, so that an appeal therefrom might be proceeded with, and not in satisfaction or settlement of the claim:—

Held, that R. had not, by complying with the judgment, waived his right of appeal therefrom.

Judgment of RIDDELL, J., set aside; and the defendant R. adjudged to be entitled to a conveyance of the plaintiff's interest, upon payment to the plaintiff of the full amount of the purchase-money; the defendant's solicitor to return the cheque received; the money in Court with accrued interest to be paid out to the plaintiff; the plaintiff to have her costs up to and inclusive of payment into Court; and no other costs to be paid by or to either party.

ACTION for possession of land, an account of profits, damages, and an injunction.

Counterclaim by the defendant Rowe for specific performance of a contract for the sale of the land and damages for illegal ejection.

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June 13. The action was tried before RIDDELL, J., without a jury, at North Bay.

J. McCurry, for the plaintiff.

G. H. Kilmer, K.C., and *J. M. McNamara*, K.C., for the defendant Rowe.

No one appeared for the defendant Radkey.

June 20. RIDDELL, J.:—The plaintiff, then Mrs. McHarry (a widow), now Mrs. Devlin, was the owner of some interest in the north half of lot 19 in concession B. in the township of Widdifield, in the district of Nipissing; and she, on the 17th January, 1906, entered into a written agreement with the defendants Radkey and Rowe. The agreement recites that she has agreed to sell to them and they have agreed to purchase from her “the lands and premises hereinafter mentioned, that is to say, all and singular that certain parcel or tract of lands and premises being composed of the north half of lot 19 . . . together with the appurtenances, for the price or sum of \$600 . . . payable \$100 cash (the receipt of which is hereby acknowledged) and \$100 on the 1st day of May, 1906, \$200 on the 15th day of January, 1907, and \$200 on the 15th day of January, 1908, together with interest on the unpaid portions at the rate of seven per cent. *per annum* till all is paid in full . . .” It is then agreed by the purchasers to pay, and the vendor, in consideration, covenants, etc., to convey and assure to them, “by a good and sufficient deed, Crown land assignment, all her interest in the said lands and premises;” and it was “expressly understood that time is to be considered the essence of this agreement, and, unless the payments are punctually made at the time and in the manner above-mentioned, the said party of the first part is to be at liberty to resell the said lands.”

The purchasers, or at least one of them, Rowe, went into possession and made improvements of a permanent value. The following payments were made under the agreement:—

D. C.	1906	Jan. 12	\$100
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				\$320

Rowe, at the time the contract was entered into, believed that the plaintiff had obtained a patent for the lands, and that she intended to sell him and his co-purchaser the fee simple. The plaintiff did not have the patent, although I find as a fact that she represented that she had, at the time the agreement was entered into—no doubt intending to get the patent before the time came for giving a deed.

The defendant Rowe in March, 1907, had made permanent improvements to the amount of \$300 in buildings and \$40 in clearing land. After he had made the last payment he found that the plaintiff had not the patent for the land; and, apparently to save himself, he tried to be located for the land himself—stopping payment of any further amount to the plaintiff, for the reason, as I find, that she had not the land patented. He did not stop improving the land, and at the present time has some sixteen acres cleared, which is worth to the place \$320. He could and would have raised the money at any time to pay, if the plaintiff had had the land to give him.

The plaintiff obtained a patent in 1908, but this was set aside; and the land is still without patent.

Recently the land has gone up in value, and of a particular kind having been discovered upon it.

Radkey transferred his interest to Rowe on the 17th July, 1906.

This action was begun in December, 1908, against both Radkey and Rowe, but discontinued against Radkey. Judgment for possession was granted by His Honour Judge Valin (Local Judge at North Bay) against Rowe on the 19th February, 1909; but this was set aside by the Master in Chambers on the 27th April, 1910, and, upon the defendant Rowe paying into Court \$470.70 to abide the order of the Court, the defendant Rowe was allowed to retain possession till the trial. The defendant has paid this sum into

Court; and the case came on for trial before me at the non-jury sittings at North Bay.

It appears that the plaintiff would by the Government be permitted to go on and finish the improvements so as to qualify her to receive a grant. She was, until she obtained her judgment (which was set aside) willing to accept the balance of the purchase-money due under the agreement, but is not now, the land having been discovered to be more valuable than she thought. She now asks possession of the land, an account of the profits, and damages, as well as an injunction, but does not offer back the money she has received nor offer to pay for the permanent improvements. She also claims for alleged wrongful acts of the defendant Rowe, which I do not here notice. The defendant Rowe claims specific performance and damages for illegal ejection by the Sheriff under the judgment since set aside.

We are not embarrassed by any act of the plaintiff of reselling the land as the agreement gave her the right to do on default of payment punctually, nor by the refusal of the defendant Rowe to take what the plaintiff can give, although that is not the fee he expected.

The contract provides for the vendor allowing the purchaser to occupy and enjoy the land until default in payment of the purchase-price or interest on the days and times above-mentioned—but the clause making time of the essence of the contract makes no provision for the contract becoming void upon failure to pay. The whole contract, however, makes it plain, I think, that, upon non-payment of any of the purchase-money, the vendor could re-enter and resell the land. If she had so sold with or without re-entry, it could not be contended that she had not the power to make a good title to the new purchaser. The provision just mentioned does not in terms put an end to the agreement and to the rights of the purchaser upon default; but it is clear law that, upon non-payment of any instalment, the vendor had the right to rescind. I do not find any such act of waiver as would deprive her of this right to rescind.

Now as to the defendant Rowe: when he discovered, as he did in 1907 (and for certain in September, 1908, at the latest) that he had been deceived in the title of the vendor, he might then have repudiated the contract and received back his purchase-

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money and obtained such damages as he was entitled to: *Webb v. Roberts* (1908), 16 O.L.R. 279. If he did that, he must needs give up possession of the property, as, if the contract was voided, he must be a trespasser. He remained in possession, and now expressly affirms the contract and insists on its terms. The contract, then, must be considered as in full force, and, under such cases as *Labelle v. O'Connor* (1908), 15 O.L.R. 519, and cases therein cited, I think effect must be given to the claim for possession. Under the same authority, the amount paid must be returned to the defendant Rowe.

As to the value of his permanent improvements, I find as follows. The extent by which the value of the land was enhanced by lasting improvements made by Rowe under the belief that the land was his own (subject to the payment of the purchase-money still unpaid) and without notice or knowledge that the vendor had not the patent, I fix at \$340. Since he knew that the vendor had not the patent he has made further improvements under the belief that the land was his own (subject to the payment of the purchase-money still unpaid, to the further amount of \$280.) I do not think, however, that he has any lien for these sums; he has lost the land by his own default.

The damages he suffered by being put out by the Sheriff are in the same position—it was his own fault: he should have paid the purchase-money, and at least have appeared and prevented the motion for judgment going as it did go when unopposed. Had he pursued a different course and offered at the proper time to complete with a reduction of the price, he might possibly have had some claim under the principle referred to in *Tomlin v. Luce* (1889), 43 Ch.D. 191—but that is now out of the question.

The plaintiff's claim for damages by reason of the defendant Rowe not performing settlement duty and thus preventing her from obtaining the patent is equally baseless—the whole trouble is due to herself: and, had the defendant Rowe acted somewhat differently, she might have found herself in a difficulty. I do not give effect to this claim.

As to costs, neither party is without blame, and I shall, in the exercise of my discretion, give no costs.

Any benefit the defendant Rowe has received from possession of the premises is more than offset by the valuable improvements he has made.

There will be an order for possession, upon the money paid on the contract being returned to the defendant Rowe with interest; the money in Court to be paid out to the defendant Rowe.

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The defendant Rowe appealed from the judgment of Riddell, J.

November 9. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

G. H. Kilmer, K.C., for the appellant. There is still a right to redeem; the appellant is not precluded by the clause in the agreement for sale making time of the essence; that has been waived by the parties. From the time the agreement is entered into, the purchaser is in equity considered the owner of the lands; and, although it is provided that time is to be the essence of the contract, yet when the purchaser has entered into possession and made permanent improvements, and paid a large part of the purchase-price, as here, the purchaser is equitably entitled to make good the default, and redeem: *Rose v. Watson* (1864), 10 H.L.C. 672. The stipulation in regard to time being of the essence is in the nature of a penalty, from which the Court will relieve: *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022. The insertion of such a clause cannot deprive the Court of the power to relieve: McCaul on Remedies of Vendors and Purchasers, p. 73; *Cheney v. Libby* (1890), 134 U.S. 68. The present case is distinguishable from *Labelle v. O'Connor*, 15 O.L.R. 519, for the same reasons as *In re Dagenham (Thames) Dock Co.* is distinguishable, as pointed out in the judgment of Anglin, J., in *Labelle v. O'Connor*, at p. 542, namely, that the large sums of money spent by the appellant on the lands would be inevitably lost to him if the Courts refused him relief. The appellant here had a valid reason for default in payment of the instalments, in that he had heard that the plaintiff had not obtained a patent to the lands: *Webb v. Roberts*, 16 O.L.R. 279. The question is, did the parties intend to repudiate the contract? *Cornwall v. Henson*, [1900] 2 Ch. 298. The plaintiff is endeavouring to treat the contract as at an end for one purpose, while relying on it for another.

J. McCurry, for the plaintiff. The plaintiff is entitled to possession of the lands, the appellant having made default in

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payments under the agreement for sale, which expressly provides that time should be the essence of the contract, and that, unless payments should be punctually made, the vendor might re-enter and sell the lands. No such waiver occurred as would deprive the plaintiff of her right to rescind, and the appellant is not entitled to specific performance: *Labelle v. O'Connor*, 15 O.L.R. 519. The right of the plaintiff to rescind arose on each default of payment of an instalment: *Fry on Specific Performance*, 4th ed., p. 455, sec. 1055. As to time being of the essence, see *Chitty on Contracts*, 15th ed., p. 354. Reference also to *Hislop v. Lester* (1909), 14 O.W.R. 624, at p. 625, and *Bisnett v. Teskey* (1908), 12 O.W.R. 18, 19.

Kilmer, in reply, referred, on the question of waiver of default, to *Demorest v. Helme* (1875), 22 Gr. 433, at p. 437, and to *McCaull on Remedies of Vendors and Purchasers*, p. 142.

December 12. The judgment of the Court was delivered by CLUTE, J.:—The plaintiff, as locatee of the Crown lands in question, entered into an agreement for the sale of the same for \$600 to the defendants Radkey and Rowe, and it was “expressly understood that time was to be considered the essence of this agreement, and, unless payments are punctually made at the time and in the manner above-mentioned, the said party of the first part is to be at liberty to resell the said lands.”

Radkey transferred his interest to Rowe, and has no further interest therein.

After the execution of the agreement, Rowe entered into possession and occupation of the lands and premises, and has been in occupation and possession thereof continuously ever since, except when, for a few days, he was dispossessed by the Sheriff. He has paid from time to time \$320 on account of principal and interest.

Rowe, at the time the contract was entered into, believed that the plaintiff had obtained a patent for the land, and that she intended to sell him and his co-purchaser the fee simple.

In March, 1907, Rowe made permanent improvements to the amount of \$300 in buildings and \$40 in clearing the land.

The plaintiff's patent was cancelled, and Rowe applied to be

located, and stopped payment of any further amount to the plaintiff, and has continued to improve the land.

The plaintiff had obtained judgment against the defendant Rowe by default, which, however, was set aside, upon the defendant Rowe paying into Court \$470.70, to abide the order of the Court, and he was allowed to retain possession to the trial.

The learned trial Judge found that the plaintiff was—until she obtained her judgment which has been set aside—willing to accept the balance of the purchase-money due under the agreement, but is not now—the land having been discovered to have been more valuable than she thought. She now asks possession of the land, an account of the profits, and damages, as well as an injunction; but does not offer back the money she has received, nor offer to pay for the permanent improvements.

The defendant Rowe claims specific performance and damages for illegal ejection.

It is pointed out in the judgment below that the clause making time the essence of the contract makes no provision for the contract becoming void upon failure to pay: "The whole contract, however, makes it plain, I think, that, upon non-payment of any of the purchase-money, the vendor could re-enter and resell the land. If she had so sold with or without re-entry, it could not be contended that she had not the power to make a good title to the new purchaser."

Riddell, J., also points out that when the defendant Rowe discovered that he had been deceived in the title of the vendor, he might then have repudiated the contract and received back his purchase-money and obtained such damages as he was entitled to, and have given up possession of the property. He, however, remained in possession, and now expressly affirms the contract and insists on its terms.

The learned trial Judge finds that the expenditure by which the value of the land was enhanced by lasting improvements made by Rowe in the belief that the land was his own, subject to the payment of the purchase-money still unpaid, and without notice or knowledge that the vendor had not the patent, was \$340; that since he knew the vendor had not the patent he had made further improvements under the belief that the land was his own, subject to the payment of the purchase-money, to the

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further amount of \$280. He does not think he has any lien for these sums; that he has lost the land by his own default, and that the damages suffered by being put out by the Sheriff are in the same position; that he should have paid the purchase-money, and at least have appeared and prevented the motion for judgment going as it did when unopposed.

The judgment appealed from is for possession, upon the money paid on the contract being repaid to the defendant Rowe with interest; the money in Court to be paid to the defendant. The result is that the defendant Rowe loses all his improvements.

The defendant Rowe now contends that he is entitled to redeem, upon payment of the balance of the purchase-money, which he is ready and offers to do, and which is now in Court. That he is so entitled cannot be doubted, unless he is precluded by the clause making time of the essence of the contract. No doubt, the giving of time is only a waiver to the extent of substituting the intended time for the original time, and not a destruction of the essential character of the contract: *Barclay v. Messenger* (1874), 43 L.J.Ch. 449.

But here there is something more than that. The default in the first place was that of the plaintiff in not having title, and the plaintiff allowed the defendant Rowe to go on and make large improvements upon the premises and continue to make those improvements without notice by the plaintiff that she could not or would not make title. During the time that proceedings were pending for the cancellation of the patent it does not appear that she upon her part was insisting or intending to insist upon the time clause, or that she entertained any idea of recouping the defendant Rowe for his improvements, in case she could not make title. His application to the Crown was made apparently to save himself, and not to defeat her claim.

The question here involved was very fully discussed in *Labelle v. O'Connor*, 15 O.L.R. 519, where, under a contract similar in form to the present, the Court held, Meredith, C.J., dissenting, that, in the absence of fraud, accident, or mistake, the provision that time should be of the essence was binding upon the plaintiff, and had not been waived by the defendants, and that no formal rescission was necessary.

The present case is, I think, clearly distinguishable from the *Labelle* case.

It will be necessary to refer more fully to the facts in this case and the conduct of the parties.

The agreement in question was entered into on the 17th January, 1906. On the 17th July Radkey sold out his interest in the agreement to the defendant Rowe. The purchase-price was \$600: \$100 in cash; \$100 on the 1st May, 1906; \$200 on the 15th January, 1907; and \$200 on the 15th January, 1908. The terms of payment were disregarded after the first payment. They were as follows: \$100 on the 12th January, 1906; \$100 on the 27th April, 1906; \$50 on the 4th January, 1907; \$50 on the 8th February, 1907; and \$20 on the 5th March, 1907.

The writ in this action was issued on the 19th December, 1908, asking possession of the lands. Judgment by default was signed on the 19th February, 1909. On the 27th April the judgment was vacated, and the defendant Rowe ordered to pay into Court the said sum of \$470.70, and he was declared entitled to possession of the lands until the trial or other determination of the action, and was directed to pay the plaintiff the costs of the application and the Sheriff's costs.

The patent was issued to the plaintiff in 1908. Nothing further was done in the present action until the 9th May, 1910, when the statement of claim was filed. In the meantime and on the 26th February, 1910, an action was begun against the plaintiff herein by the Attorney-General, alleging that the patent issued to her for the land in dispute was obtained by fraud, and asking that the same might be cancelled. The case was tried before Latchford, J., and judgment given in favour of the defendant, but, upon appeal, it was held that the settlement duties had not been performed, to the knowledge of the defendant therein (plaintiff herein), and that the patent should be set aside, but that it did not follow that the defendant should lose the land. The revocation simply put the matter where it stood before the patent was issued, the Court observing that the Crown could be trusted to act with justice towards the defendant (plaintiff herein) upon a fresh application; and upon application being made, the plaintiff was informed, on the 19th April, 1910, that she would be

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permitted to go on and finish the improvements, and when the improvements were completed the patent would issue.

The plaintiff in her affidavit sworn on the 13th February, 1908, states that there was due and owing to her on the 17th December, 1908, and that there is still due and owing to her under the said agreement, the sum of \$470.70, and that she desires to restrain the defendant Rowe from cutting and selling wood. She does not assert that the contract is rescinded.

In her statement of claim she alleges that at the time judgment was entered Rowe was indebted to her under the agreement in the sum of \$470.70. The plaintiff further expressly declares that she was ready and willing, until the judgment by default was entered on the 19th February, 1909, to accept the amount due under the said agreement. In other words, up to the time of the swearing of her affidavit above referred to, she was treating the agreement as subsisting, and claiming that the \$470.70 unpaid was still due thereunder.

It would appear to me that the position taken by the plaintiff upon the motion to set aside the judgment is inconsistent with that taken at the trial. She was insisting upon a certain balance being due; that amount was paid into Court as being the amount claimed to be due by her. Having regard to the fact that the clause with reference to time was disregarded in respect of all payments subsequent to the first; that, with the knowledge of the plaintiff, the defendant Rowe entered into possession and continued in possession and made improvements during this period when the time clause was so disregarded; and to the further fact that the plaintiff continued to treat the agreement as subsisting and claimed the balance due thereon; and that the delay was partly due to the want of title and the proceedings taken by the Attorney-General; and that the defendant, in the *bonâ fide* belief—as the learned trial Judge has found—that he was the true owner, continued to make improvements after the default judgment had been set aside, and he had been again let into possession: in short, having regard to all the facts and circumstances of this case—the only fair inference deducible therefrom, in my judgment, is that neither party regarded time as of the essence of the contract, but that both parties treated that clause as having been waived; and that the plaintiff ought not to be

heard at once to affirm the contract, with a view of compelling the defendant to pay into Court the full balance of the purchase-money, and at the trial, when the balance of the purchase-money is in Court, to take the position that the agreement had been rescinded, and that she was entitled to treat him as a trespasser.

"Time, though of the essence of the contract by original agreement, . . . may be . . . waived, by subsequent agreement, or by conduct of the parties amounting to waiver:" Dart on Vendors and Purchasers, 7th ed., p. 503.

"Objections grounded on the lapse of time are waived by a course of conduct inconsistent with the intention of insisting on such objection: and in this respect it is immaterial whether time were originally of the essence or subsequently engrafted on the contract:" Fry, 4th ed., sec. 1120; *King v. Wilson* (1843), 6 Beav. 124. In that case the Master of the Rolls (Lord Langdale) thought that there was something which might have been done after the fixed time by means of which the contract would have been completed, and he thought, under the circumstances, that the contract had not been put an end to.

Here, after writ issued and possession asked, the plaintiff, in unequivocal language, claims the balance of the purchase-money as still due, and in her statement of claim (paragraph 15) reiterates her willingness "up and until the judgment herein to accept from the defendant the amount due under the said agreement." The balance of the purchase-money could not be due her if the agreement had in fact been put an end to. She insisted on the contract to the extent of procuring a clause to be inserted in the order for payment into Court of the balance of the purchase-money as an amount still due to her. It seems difficult to imagine a clearer affirmation of the contract as existing than this was. It wholly disregarded the time clause which is now relied on to defeat the defendant Rowe's right to redeem. But "insisting on the contract after the time limited for completion is an act waiving the right to insist on that time as essential:" Fry, sec. 1121; *Pegg v. Wisden* (1852), 16 Beav. 239; see also *Webb v. Hughes* (1870), L.R. 10 Eq. 281; *Hudson v. Bartram* (1818), 3 Madd. 440.

The parties in the present case have, I think, by their conduct waived the clause in regard to time.

"Where the contract undoubtedly is an executory contract,

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in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate." *Rose v. Watson*, 10 H.L.C. 672, 678.

In the present case the entire purchase-money has been paid either to the plaintiff or into Court in terms of an order supported by an affidavit wherein the plaintiff claimed the amount as still due.

In my opinion, it would be a gross injustice if the plaintiff was now permitted to change her position and to refuse to accept the balance due her, thus depriving the defendant Rowe of his improvements upon the land.

In the view I take of the case, it is unnecessary to consider, further, whether, having regard to the findings of the learned trial Judge, the defendant Rowe would not, in any event, be entitled to improvements made in the *bonâ fide* belief that he was the owner of the land.

A further objection was taken by the plaintiff's counsel that the defendant Rowe was precluded from moving to set aside the judgment entered at the trial, upon the ground that the plaintiff's solicitors had delivered to the defendant's solicitor a cheque for \$395, being the amount of the purchase-money paid by the defendant Rowe and interest. But Mr. McNamara has made an affidavit, which is not contradicted, that this cheque was given merely in order to have formal judgment entered to further the appeal, as he understood the clerk would not enter judgment unless the amount were paid, and that the same was not given or received in satisfaction or in settlement of the claim.

I do not think what took place between the solicitors ought to prejudice the defendant's right.

The judgment should be varied and the defendant Rowe let in to redeem upon payment to the plaintiff of the full amount of the purchase-money, which will include a return of the cheque given to the defendant's solicitor for \$395, and the payment out to the plaintiff of the \$470.70 with interest accrued, now in Court, with costs to and inclusive of payment into Court.

The plaintiff, denying the right of redemption, should, in ordinary cases, pay the costs, but the conduct of the defendant Rowe in the present case is not free from censure. While still holding possession under the agreement, he applied to the Government in his own interest to be entered for the land without giving notice to the plaintiff. He made default from time to time and only paid into Court the amount of the purchase-money as a term by which he was allowed to defend.

Having regard to the peculiar circumstances of this case, I think there should be no costs, except as aforesaid, in the Court below or of this appeal.

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Assessment and Taxes—Distress for Taxes—Seizure of Goods on Premises of Person Taxed—Claim of Title through Person Taxed—Assessment Act, 1904, sec. 103—Action against Tax Collector—Validity of Appointment—Resolution of Municipal Council—Municipal Act, 1903, secs. 295, 321, 395—Position of de Facto Officer.

A., the owner of a mare, transferred her to the plaintiff to hold as security for the protection of certain persons against their liability upon a promissory note which they had indorsed for A. The arrangement was evidenced by a document recorded under the Act respecting Bills of Sale and Chattel Mortgages. A. agreed to care for and exercise the mare, and was to be at liberty to enter her at the races. She was then removed from his premises and boarded at a hotel stable. When out for exercise A. took her upon his premises for a temporary purpose, and she was then distrained by the defendant, a tax collector, for municipal taxes due by A. in respect of his premises, and was ultimately sold—the proceeds being paid to the municipality:—

Held, that the mare, being upon A.'s land, and the plaintiff claiming title through A., the person taxed, the defendant had the right to take her: Assessment Act, 4 Edw. VII. ch. 23, sec. 103.

The defendant's appointment as tax collector was by resolution, not by by-law, of the municipal council:—

Held, that the defendant was duly appointed.

Section 325 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, providing that the powers of the council shall be exercised by by-law, refers to the exercise of municipal legislative power, and not to the performance of a statutory duty. Under sec. 295 it is the duty of the council annually to appoint assessors and collectors; and there is no reason why this duty should not be discharged in any way indicating corporate action, *e.g.*, by resolution.

The effect of sec. 321 of the Act, and the position of a *de facto* officer of a municipality, when his actions are directly attacked in proceedings against him personally, referred to but not determined.

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APPEAL by the plaintiff from the judgment of the County Court of Kent of the 10th September, 1910, dismissing an action to recover damages for the wrongful distress and sale of the plaintiff's property for the taxes of one O. W. Adair, in whose possession the property had been placed by the plaintiff.

November 21. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

W. E. Gundy, for the plaintiff. The mare in question was not liable to distress. The mare was only temporarily on the lands of Adair, and such a fleeting stay is not what is meant by "on the land" in sec. 103 of the Assessment Act, 4 Edw. VII. ch. 23 (O.) The section applies only where the possession has always been on the premises. Adair's possession of the mare was only as agent of Foster: sec. 103, sub-sec. 3; *Horsman v. City of Toronto* (1900), 27 A.R. 475. The defendant was not a duly appointed tax collector, and, when the taking of the mare is sought to be justified, the defendant must strictly prove his right to take: Dillon on Municipal Corporations, 4th ed., pp. 321, 1079; *Township of McKillop v. Township of Logan* (1899), 29 S.C.R. 702; *Hall v. Manchester* (1859), 39 N.H. 295.

M. Wilson, K.C., for the defendant. Under sec. 103 of the Assessment Act the right to distrain for taxes is placed on the same footing as a landlord's right to distrain for rent, and the chattel in question here was liable to distress. Adair was all the time in possession of the horse, which never went into the possession of the mortgagee. Reno was the duly appointed tax collector, though in 1909 his appointment was not by by-law but by resolution. The section of the Municipal Act, 1903, authorising the appointment of collectors, is sec. 295, and there is nothing in it saying that the council cannot appoint without a by-law. I refer to *Township of Pembroke v. Canada Central R.W. Co.* (1882), 3 O.R. 503; *Hadley v. Westman* (1910), 1 O.W.N. 673; Dillon on Municipal Corporations, 4th ed., p. 461, and notes thereat, and p. 1078, sec. 892; *Martin v. City of St. Catharines* (1909), 13 O.W.R. 559; *In re McPherson and Beeman* (1859), 17 U.C.R. 99. The defendant was appointed in 1908, and continued in office: sec. 321 of the Municipal Act. He was the *de facto* collector at least.

Gundy, in reply.

December 12. The judgment of the Court was delivered by MIDDLETON, J.:—Action against a tax collector for wrongful distress. Upon the argument we held that the plaintiff had not successfully attacked the finding of fact that notice had been given as required by the statute fourteen days before distraining. Judgment was reserved to enable us to consider three contentions put forward upon his behalf:—

(1) That the mare in question was not liable to distress. Adair, the person assessed as owner of the lands in question and the owner of the mare, made a chattel mortgage to one Shaw. As further security a collateral note was taken by the mortgagee, indorsed by three men in some way interested in the racing of the mare. After the tax bills had been distributed and demand made, some anxiety was felt by these indorsers, and an arrangement was made, evidenced by a document recorded under the Act respecting Bills of Sale and Chattel Mortgages, by which the mare was transferred to the plaintiff to hold as security for the protection of the indorsers against their liability upon the note. The owner agreed to care for and exercise her, and was to be at liberty to enter her at the races. She was then removed from his premises and boarded at certain hotel stables. When out for exercise Adair took her upon his premises for a temporary purpose, and she was there seized by the defendant, and ultimately sold—the proceeds being paid to the municipality.

Under sec. 103 of the Assessment Act, 4 Edw. VII. ch. 23, the right to distrain for taxes is placed practically upon the same plane as the landlord's right to distrain for rent. The right is given to take "any goods and chattels on the land," where title is claimed, *inter alia*, by "purchase, gift, transfer or assignment from the person taxed . . . whether absolute . . . or by way of mortgage, or otherwise." This horse was upon the land, and the plaintiff claims title through the person taxed.

We can find no reason why full effect should not be given to the words of the statute. At common law any goods of a third party, subject to certain well-defined exceptions not now material, could be taken for rent if found by the landlord upon the land. The landlord might not bring the goods of a stranger upon the land for

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the purpose of there distraining them: *Paton v. Carter* (1883), Cab. & Ell. 183. The anomalous right of the landlord to take the goods of third parties for his tenant's debt: *Gorton v. Falkner* (1792), 4 T.R. 565; *Challoner v. Robinson*, [1908] 1 Ch. 49: is conferred upon the municipality to enable it to enforce payment of taxes.

(2) The plaintiff then contends that the defendant was not duly appointed tax collector, and that, when the taking of the chattel in question is sought to be justified, the defendant must strictly prove his right to take.

In 1908 the defendant was, it is admitted, duly appointed collector for that year. In 1909, the year in question, his appointment was by resolution, and not by by-law. This is the ground of attack. Section 325 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, enacts that "the powers of the council shall be exercised by by-law." It has sometimes been assumed that this section requires that all municipal action must be by by-law. This assumption ignores the composite nature of the municipal council. It is a legislative body—a very wide law-making power has been conferred upon it. This power must be exercised by by-law. It is also an administrative body. Many duties are imposed upon it as to which it has no discretion—these duties it can discharge without the formality of a by-law. Indeed, the term "by-law"—a law enacted by a subordinate legislative body—cannot be appropriately used when speaking of the discharge of a statutory duty. Section 325 refers to the exercise of municipal legislative power, and not to the performance of a statutory duty.

This distinction is recognised in *Croft v. Town Council of Peterborough* (1856), 5 C.P. 141, where Macaulay, C. J., speaking of the liability of a municipality for the change of grade of a highway without a by-law, which, in his opinion, was necessary, says (pp. 148, 149): "If what was done could be regarded as necessary to maintain and keep the road in repair, and therefore incumbent upon the defendants, as a duty . . . I have no doubt it could be justified without a by-law." The same principle is recognised in *Pratt v. City of Stratford* (1887-8) 14 O.R. 260, 16 A.R. 5, and in the cases there collected.

Under sec. 295 it is the duty of the council annually to appoint

assessors and collectors. There is no reason why this duty should not be discharged in any way indicating corporate action, *e.g.*, by resolution, as in this case. Every duty imposed no doubt implies a power to discharge that duty—manifestly many of the minor duties imposed by law cannot contemplate or require a by-law, and may be well left to officers of the corporation, and the line must be drawn in some way. The distinction between legislative power and power as incidental to the discharge of a statutory duty is logical and can be productive of no inconvenience.

This renders it unnecessary to consider the effect of sec. 321 relied upon by the defendant, and the third point arising upon the plaintiff's case, the position of a *de facto* officer of a municipality, when his actions are directly attacked in proceedings against him personally. On this point there is a very valuable discussion in *State v. Carroll* (1871), 38 Conn. 449; see also *Green v. Burke* (1840), 23 Wend. (N.Y.) 490; *Patterson v. Miller* (1859), 59 Ky. 493; *Kimball v. Alcorn* (1871), 45 Miss. 151; *Schlencker v. Risley* (1842), 3 Scammon (Ill.) 483; *Cummings v. Clark* (1843), 15 Vt. 653; Vinner's Abr., "Officers," (G. 3) and (G. 4), vol. 16, p. 114.

The appeal fails and should be dismissed with costs.

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RE ROWLAND AND McCALLUM.

Nov. 18.

Dec. 1.

Dec. 14.

Statutes—Imperative or Directory—Municipal Drainage Act, 1910, sec. 48—Appeal to County Court Judge—Time for Delivering Judgment—Prohibition—Leave to Appeal to Divisional Court—Conflicting Decisions—Con. Rule 777 (3) (a).

The provision of sec. 48 of the Municipal Drainage Act, 10 Edw. VII. ch. 90, that a County Court Judge, upon hearing an appeal from a decision of a Court of Revision, "shall deliver judgment not later than 30 days after the hearing," is imperative.

Prohibition to a County Court Judge against the enforcement of a judgment delivered after the lapse of 30 days from the hearing.

In re Township of Nottawasaga and County of Simcoe (1902), 4 O.L.R. 1, and *In re Trecothick Marsh* (1905), 37 S.C.R. 79, applied and followed.

In re Ronald and Village of Brussels (1882), 9 P.R. 232, and *Re McFarlane v. Miller* (1895), 26 O.R. 516, discussed.

Judgment of MEREDITH, C.J.C.P., reversed.

Held, by RIDDELL, J., in granting leave to appeal to a Divisional Court, under Con. Rule 777 (3) (a), upon the ground that there were conflicting decisions, that for the purposes of the Rule decisions of the Judges of the Court of Appeal should be considered decisions of "Judges of the High Court."

THE Corporation of the Township of McKillop decided to proceed with the construction of certain drainage work under the Municipal Drainage Act, 10 Edw. VII. ch. 90, pursuant to a petition signed by a sufficient number of ratepayers, of whom McCallum was one. The township corporation employed an engineer to make a report. His report was made on the 4th April, 1910. A by-law was provisionally passed on the 30th April, 1910, and notice in accordance with the requirements of the Act duly served on all persons interested. No motion was made to quash the by-law. Michael Rowland, a ratepayer, appealed against his assessment for the drainage work. The appeal first came before the Court of Revision, and was dismissed on the 17th June, 1910. An appeal was then taken by Rowland to the Judge of the County Court of Huron, pursuant to sec. 44 of the Act. This appeal was heard on the 30th August, 1910. On the 29th September, 1910, the County Court Judge gave a judgment by which he purported to set aside the whole drainage scheme—as if the application had been under the Ditches and Watercourses Act. McCallum and the township corporation thereupon applied

for an order of prohibition, which was granted by FALCONBRIDGE, C.J.K.B., on the 21st October, 1910.

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On the 24th October, 1910, the County Court Judge gave another judgment, as if upon the same appeal which he had purported to dispose of by his judgment of the 28th September. By this second judgment he allowed Rowland's appeal, reduced his assessment by \$50, and directed payment to him of \$15.50 for disbursements.

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A new application for prohibition was then made on behalf of McCallum and the township corporation, upon three grounds: (1) that the Judge was *functus* after having delivered judgment on the 28th September; (2) that the judgment was of no effect, in that it did not apportion the reduction over the remaining property; and (3) that the judgment was pronounced after the expiration of more than 30 days from the hearing, contrary to the provisions of sec. 48 of the Act.

November 18. The motion was heard by MEREDITH, C.J.C.P., in Chambers.

H. S. White, for the applicants.

W. Proudfoot, K.C., for Michael Rowland, the respondent.

MEREDITH, C.J. (at the close of the argument):—I think that this motion must be dismissed. It is perhaps difficult, in view of the decisions, to be absolutely sure of what the proper construction of the statute is.

The strongest case that can be invoked in favour of the motion is *In re Township of Nottawasaga and County of Simcoe* (1902), a decision of the Court of Appeal, reported in 4 O.L.R. 1. The question there arose upon a provision of the Assessment Act dealing with the equalization of assessments. An appeal was given to the Judge of the County Court, and the provision of the Act was, after providing for the time within which the appeal was to be launched, that "the judgment" of the said Court "shall not be deferred beyond the 1st day of August next after such appeal." It was held that compliance with that provision was imperative, and that after the 1st day of August the County Court Judge was *functus*.

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In delivering judgment, Mr. Justice Maclellan, at p. 19, after referring to the inconvenience that would result from which-ever construction was put upon the language of the statute, that in the event of it being determined that the provision was not imperative it might delay the imposing by the county council of the rate and tie up the whole matter until the judgment was delivered, while, if it was held to be imperative and the Judge was *functus*, then the right which was intended to be conferred by the appeal was gone without any fault, it might be, of the appellant, uses this language: "I think it is impossible to disregard the prohibitory language of the Legislature. The Judge is *forbidden* to defer his judgment. It is not merely *shall* do something, as that he shall give his judgment on or before the 1st of August, but he *shall not* defer it beyond that date. He is bound so to regulate the proceedings before him that he may comply with the statute. He had the power to do that. He could assign to the parties, and reserve for himself, what he deemed a reasonable share of the time at his disposal. I am unable to see that to hold the word 'shall' to be obligatory is either inconsistent with the context, or inconsistent with the intent or object of the Act, and therefore, as required by the Interpretation Act, it must be held imperative." Neither of the other Judges who delivered judgment deals with it exactly in the same way, although Mr. Justice Osler, at p. 15, referring to the view that it was not imperative, says: "Opposed, however, to this view are the considerations that the words of the sub-section are in the emphatic negative form, '*but the judgment shall not* be deferred beyond the 1st day of August,' and not only so, there is an excepted case, 'except as provided in sections 58 and 61,' in which it seems to be implied that judgment may be so deferred. The force of this exceptive language, as aiding the construction of what follows it, as imperative and prohibitory, is weakened by the fact that it may not be very easy to apply the exception." So that both of those learned Judges put emphasis upon the negative form in which the provision of the statute was couched. Chief Justice Armour quotes the language as to the judgment not being deferred, but apparently does not emphasise those words as do the other two Judges.

Then as opposed to that there is the case—perhaps not as opposed, but as more applicable to the case in hand—which Mr. Proudfoot refers to, *Re McFarlane v. Miller* (1895), 26 O.R. 516, where the question arose upon the Ditches and Watercourses Act, and the language of the provision under consideration (sub-sec. 6 of sec. 22) was: “(6) It shall be the duty of the Judge to hear and determine the appeal or appeals within two months after receiving notice thereof from the clerk of the municipality as hereinbefore provided.” It was held that that was not an imperative provision having the effect of making the Judge *functus* after the expiry of the two months.

It was much easier to give that effect to that provision than it was to so construe the provision that the Court of Appeal had to deal with; and perhaps than it is for me to construe as directory only the provisions of the section in question, because the language, “It shall be the duty of the Judge to hear and determine,” indicates that this was intended as the mandate to the Judge rather than a limitation of the time within which he should have jurisdiction to act.

However, as far as it goes, that case helps the view of the respondent.

The provision of the statute upon which Mr. White’s argument is based, sec. 48 of the Municipal Drainage Act, 10 Edw. VII. ch. 90, reads as follows: “48. At the Court so holden the Judge shall hear the appeals and may adjourn the hearing from time to time, but shall deliver judgment not later than 30 days after the hearing.”

I think these words are only directory. I think that on the general principles applicable to the construction of such a statute as this, that is the proper meaning to be given to the section. The provision ought to be treated as directory only if the language used permits, when the consequence of treating it as imperative would be that, owing to no fault of the appellant, by the inaction of the Judge, the appellant would be deprived of his right of appeal. I think a statute ought not to be so construed unless the language of the Legislature clearly requires that meaning to be given to it.

When the emphasis that was given by two of the Judges of

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the Court of Appeal in the *Nottawasaga* case to the negative form in which the section there under consideration was cast, is considered, that it was a prohibitory section, I think I am not prevented by that decision from holding the provisions of sec. 48 of the Municipal Drainage Act to be directory only.

The motion must be refused with costs.

Leave to appeal from the order of MEREDITH, C.J., was applied for by McCallum and the township corporation.

November 25. The application was heard by RIDDELL, J., in Chambers.

White, for the applicants.

Proudfoot, K.C., for Michael Rowland.

December 1. RIDDELL, J.:—I need not reiterate the care which should be taken in applications of this sort to see that the matter comes fairly under the new Con. Rule 777 (1278): *Sovereign Bank of Canada v. Rance* (1910), 1 O.W.N. 361; *Robinson v. Mills* (1909), 19 O.L.R. 162, at p. 167.

In the present case I think that it can fairly be said that there are conflicting decisions—and, though in one case the decisions are those of the Judges of the Court of Appeal, these should, I think, for the purpose of the Con. Rule, be considered decisions of “Judges of the High Court.”

I grant leave to appeal under Con. Rule 777(3) (a).

Costs in the appeal.

December 12. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

White, for the appellants, argued that the provision in sec. 48 of the Drainage Act of 1910 that the Judge “shall deliver judgment not later than 30 days after the hearing” is imperative and not merely directory, citing *In re Township of Nottawasaga and County of Simcoe*, 4 O.L.R. 1. *Re McFarlane v. Miller*, 26 O.R. 516, which is relied on by the respondent, is the judgment of a Divisional Court, and not of equal authority with the decision of the Court of Appeal in the *Nottawasaga* case,

in the argument of which the *McFarlane* case was cited, though not discussed. Reference was also made to *In re Ronald and Village of Brussels* (1882), 9 P.R. 232, in which Cameron, C.J., thought that a somewhat similar provision was directory, but he expressed great doubt on the point, and here the language of the statute is different, and stronger. He also cited *In re Smith and Corporation of Plympton* (1886), 12 O.R. 20, 34. On the question as to whether the County Court Judge had power to alter his judgment in the way he had done, without hearing further argument, and whether prohibition would lie in such a case, the following cases were referred to: *Re Tipling v. Cole* (1891), 21 O.R. 276; *In re Forbes v. Michigan Central R.W. Co.* (1893), 20 A.R. 584; *Jones v. Jones* (1848), 5 D. & L. 628; *Irving v. Askew* (1870), L.R. 5 Q.B. 208; *Port Elgin Public School Board v. Eby* (1895), 17 P.R. 58.

W. Proudfoot, K.C., for the respondent, argued that the first judgment being clearly erroneous, and based upon a misconception of the County Court Judge, he was right in making the second order, dealing with the subject-matter actually before him, and no further argument was necessary, as all the evidence had been taken and the case had been fully argued. The only difficulty was as to his power to deal with the matter when more than 30 days had elapsed since the hearing, and it was submitted that on this point the Court should follow the *McFarlane* case. The *Nottawasaga* case was distinguishable, as the decision in that case was based upon "the emphatic negative form" in which the section which was there in question is framed: see the judgment of Osler, J.A., at p. 15 of the case. The *Smith* and *Ronald* cases are in favour of the respondent's contention. He referred to the authorities cited on the argument of the *Nottawasaga* case, 4 O.L.R. at p. 9, and to Proctor's Drainage Acts, p. 76.

White, in reply.

December 14. The judgment of the Court was delivered by *BOYD, C.*:—The appeal was heard by the Judge on the 28th August, and he reserved judgment till the 28th September, when he gave an inapt judgment, the enforcement of which was

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stopped by an order of prohibition. Then, on the 24th October, he proceeded, apparently of his own motion, to give another judgment reducing the amount assessed against the appellant's property from \$80 to \$50.

A second prohibition was moved for and refused by Meredith, C.J.C.P., following *Re McFarlane v. Miller*, 26 O.R. 516, rather than *In re Township of Nottawasaga and County of Simcoe*, 4 O.L.R. 1, and leave to appeal was granted by Mr. Justice Riddell.

The language of the statute to be considered is as follows: "At the Court so holden the Judge shall hear the appeals and may adjourn the hearing from time to time, but shall deliver judgment not later than 30 days after the hearing:" 10 Edw. VII. ch. 90, sec. 48. This section first appears in 57 Vict. ch. 56, sec. 45, and, by reference to 55 Vict. ch. 48, sec. 68(7), appears to be a modification of that section, relating to appeals from the Court of Revision, and this provides: "At the Court so holden, the Judge shall hear the appeals and may adjourn the hearing from time to time, and defer judgment thereon at his pleasure, but so that all the appeals may be determined before the 1st day of August."

Upon this last cited section (then R.S.O. 1877, ch. 180, sec. 59, sub-sec. 7) it was held, though with hesitation, by Cameron, J., in *In re Ronald and Village of Brussels*, 9 P.R. 232, 237, 238 (1882), that the words were not apt to express positive prohibition against the Judge acting after the 1st August, and he thought that there was still jurisdiction to proceed thereafter.

Under the Ditches and Watercourses Act, 57 Vict. ch. 55, sec. 22, sub-sec. 6, it shall be the duty of the Judge to hear and determine the appeal within two months after receiving the notice. It was held that this limit of time was only directory, by a Divisional Court composed of Rose and Falconbridge, JJ., in *Re McFarlane v. Miller*, 26 O.R. 516 (1895).

In the revision of 1887 (ch. 220, sec. 11, sub-sec. 5) this sub-section had an addition of these words, "but his neglect or omission so to do shall not render invalid the hearing or determining of the appeal after the lapse of that time." The Judges

seemed to think that these words were dropped because they were of a declaratory nature, and that their omission did not indicate any intention to change the law as it was apart from that declaration.

However this may be, we find the Legislature in 1901 (1 Edw. VII. ch. 12, sec. 22) adding to this sec. 22 the following, "or within such further period as the Judge on hearing the parties may decide to be necessary in order to allow proper inspection of the premises," etc. So, as to the particular Act in question as to Municipal Drainage, we find the Legislature employing "the apt words of restriction," which were not in the original of the section as it was construed by Cameron, J., in *In re Ronald and Village of Brussels*.

The Judge is now directed thus: He *shall* hear, he *may* adjourn; but *shall* deliver judgment not later than 30 days from the hearing. The effect of the words "shall" and "may" is here emphasised, and it is rather a misfortune than otherwise to see a disposition to read them as interchangeable and convertible. The force of the Interpretation Act was upheld by Armour, C.J.O., in *In re Township of Nottawasaga and County of Simcoe*, 4 O.L.R. at p. 11; and it appears to me to be a wholesome rule to bring about some certainty in the present flux of judicial opinion. The trend of legislation in this and kindred provisions for drainage suggests to my mind that the time-limits prescribed are meant to be observed, and that summary and prompt and well-defined periods are given within which to bring to a practical close these disputes of merely local importance. There is sound sense and force in the words of Martin, B., in *Bowman v. Blyth* (1856), 7 E. & B. 47, 48: "I do not question that, in construing Acts, language seemingly positive may sometimes be read as directory, yet such a construction is not to be lightly adopted; and never when . . . it would really be to make a new law instead of that made by the Legislature." The recent legislative changes cited by me indicate when the intention is to give latitude and when strictness is to be observed in the judicial operations of the Court or Judge in these municipal matters. The burden is on the party who claims that "shall" is to be read as permissive and not as peremptory: and the text of this section and its history fortify

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D. C. that position. No reasons appear for any relaxation of the time-
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The method of decision arrived at in *In re Township of Nottawasaga and County of Simcoe* has been followed in the Supreme Court in *In re Trecothick Marsh* (1905), 37 S.C.R. 79.

Where the statute plainly declares that proceedings shall be taken or acts done within a time definitely fixed, it is not well to multiply exceptions so as to hold that the words do not mean what they express, but are movable to suit the exigencies of particular cases.

I would follow *In re Township of Nottawasaga and County of Simcoe*, and hold that the Judge was *functus officio* at the end of the thirty days fixed by statute.

No costs.

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COLVILLE V. SMALL.

Champerty—Action by Assignee of Claim—Agreement to Divide Fruits—Illegality—Dismissal of Action—Amendment—Parties.

The judgment of MIDDLETON, J., *ante* 33, dismissing the action, upon the ground that it could not be maintained because the plaintiff's title to the chose in action was asserted under a champertous assignment, was affirmed by a Divisional Court.

The general principle is, that all champertous agreements are void; and, if a party to a champertous agreement must rely upon it to sustain an action, he fails; but, if he, although a party to such an agreement, can make out his case without the agreement, its existence does not void the right of action he has without it: *per* RIDDELL, J.

Semble, also, *per* RIDDELL, J., that, apart from authority, there is no moral wrong in such a transaction.

Leave to amend by adding the plaintiff's assignors or substituting them as plaintiffs, refused.

An appeal by the plaintiff from the judgment of MIDDLETON, J., *ante* 33, dismissing the action, upon the ground that the assignment to the plaintiff of the claim sued on was champertous.

November 30. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. M. McClemon, for the plaintiff, relied on the authorities cited in *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 5, pp. 831-834,

especially foot-notes 1, 2, 3, on p. 834, and on the principle set out in 6 Cyc. 881, and referred to in the judgment of the learned Judge in the Court below, that "the weight of authority . . . supports the rule that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defence thereto, and can only be set up between the parties when the champertous agreement itself is sought to be enforced." It is submitted that this rule applies to the case at bar, although the learned Judge's view is that in England and Ontario it applies only when the action is brought by the person in whom the cause of action is originally vested. The judgment of Davies, J., in *Newswander v. Giegerich* (1907), 39 S.C.R. 354, supports the plaintiff's contention. It cannot be determined whether or not an action is champertous until the facts have been gone into at the trial. The action should not have been dismissed, as the rights of all parties might have been saved by recourse to the practice under Con. Rules 206, 259, 260. In this way multiplicity of actions and unnecessary costs might have been avoided. Reference was also made to the following cases: *Van Gelder v. Sowerby Bridge Flour Society* (1890), 44 Ch. D. 374; *Leeming v. Armitage* (1899), 18 P.R. 486; *Meloche v. Deguire* (1903), 34 S.C.R. 24; *Powell v. Watters* (1897), 28 S.C.R. 133; *Burlinson v. Hall* (1884), 12 Q.B.D. 347; *Fitzroy v. Cave*, [1905] 2 K.B. 364.

J. L. Counsell, for the defendant, relied upon the reasons set forth and the cases cited in the judgment of Middleton, J. The *Fitzroy* and *Burlinson* cases have no application to the present case. The rule as to adding or substituting parties referred to by the plaintiff's counsel does not contemplate such action being taken in the case of a party who has no right to be so added or substituted, and, if there were power to make such an order as is suggested, it would be a matter of discretion with the Court, which should not go out of its way to help the plaintiff in such a case.

McClemont, in reply.

December 15. RIDDELL, J.:—Whatever the law may be in the States of the American Union, there can, I think, be no doubt as to the law in Ontario, following the law in England.

The general principle is, that all champertous agreements are void—the older cases say *malum in se*. If then a party to a cham-

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pertous agreement must rely upon the illegal agreement to sustain an action, he fails; but, if he, although a party to such an agreement, can make out his case without calling in the agreement, the existence of the invalid agreement does not void the right of action he has without it. For example, if a plaintiff have agreed with his solicitor or a third person to give him a portion of the profits arising from the successful prosecution of a suit, upon being indemnified against the costs, he will not be barred in his action—he is in the same position *quoad* the defendant as though he threw away the agreement altogether—the agreement does not enter into the action. The fact of the agreement being void does not affect the actual right of action he has. But, if the solicitor or third person, assignee, should bring an action, as he has no right of action at all unless the agreement has effect, and it has none in law, he will fail: *Hilton v. Woods* (1867), L.R. 4 Eq. 432.

All the cases in our Courts and those in England are reconcileable upon this plain principle.

We cannot consider what the law should be, but only what it is. Were the matter free from authorities binding upon us, I should, for my part, dissent *in toto* from the proposition that there is any moral wrong in such a transaction—the old Judges who considered such a transaction *malum in se* had the same bad opinion of an assignment of a chose in action of any kind. It was necessary to call upon the custom of merchants (merchants are generally reasonable and non-technical in their customs) to support the assignability of mercantile paper. I cannot work myself into a state of indignation over a transaction of this character as the venerable sages of the law did—particularly as in the present state of the law, as every one admits, had the real creditor assigned the whole of the claim to the plaintiff without stipulating for the return to him of a part, the transaction would have been wholly innocent and valid, although at one time such a transaction would have drawn down upon the offenders the wrath of the Courts. Why one may assign the whole but not the half of a claim is one of the mysteries of statute-law. The common law rule is but a branch of the application of the maxim *beati possidentes*, never baldly expressed, but in reality underlying much of our common law. Parliaments and Legislatures have been forced to cause a relaxation or reversal of many rules having that maxim as their basis—something yet remains

to be done. But the law as it exists is correctly stated and applied by my learned brother, and the appeal should, so far as this ground goes, be dismissed.

It is contended that the plaintiff should have leave to amend by adding his assignors, or substituting them, as plaintiffs. The Rules, however, never were intended to cover a case in which the actual plaintiff has no cause of action, but it is suggested some one else may have.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree with the judgment appealed from on the grounds set forth therein (22 O.L.R. 33).

The appeal must be dismissed with costs.

BRITTON, J.:—I agree that the appeal of the present plaintiff must be dismissed, but nothing in the present action or its result should prevent the recovery by the assignors, Remo Gori & Co., or prejudice them in any action for any just claim that the company may have or had against the defendant, for any matter or thing mentioned in the statement of claim herein.

[DIVISIONAL COURT.]

RE HORSESHOE QUARRY CO. AND ST. MARY'S AND WESTERN
ONTARIO R.W. CO.

Arbitration and Award—Dominion Railway Act—Award under—Enforcement by Summary Order under Ontario Arbitration Act, sec. 14—Arbitrators—Omission to Name Day for Making Award—Statutory Provision—Waiver.

The Ontario Arbitration Act, 9 Edw. VII. ch. 35, sec. 14, applies to awards under the Dominion Railway Act so as to confer jurisdiction upon the High Court to entertain summary applications to enforce such awards. The Dominion Act provides for appeals, but does not provide machinery for the enforcement of awards; the Provincial Act applies to all awards where the particular Act does not provide machinery for enforcement. The omission of arbitrators to name a day before which the award is to be made (sec. 204 of the Dominion Railway Act) does not invalidate the award; naming a day is not a condition precedent to jurisdiction; the ascertaining of the sum offered as that to be paid results from failure to award within a time fixed, and not from failure to fix a time; the statutory provision is one in favour of the railway company, and is waived by proceeding with the arbitration.

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AN appeal by the railway company from an order of MEREDITH, C.J.C.P., made on the 17th November, 1910, upon the application of the Horseshoe Quarry Co. and the London and Western Trusts Co., directing the enforcement of a land compensation award under the Dominion Railway Act, by the railway company paying to the London and Western Trusts Co. \$2,100, the amount awarded, together with the costs of the arbitration.

December 12. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

C. A. Moss, for the railway company. Under sec. 204 of the Dominion Railway Act the arbitrators were bound to fix a day on or before which their award should be made, and, in default of their doing so, the sum offered by the railway company should be the compensation to be paid by them. That provision is imperative and not merely directory: *Demorest v. Grand Junction R.W. Co.* (1885), 10 O.R. 515, referred to in Jacobs's Railway Law of Canada, p. 308, where reference is also made to *North Shore R.W. Co. v. Beaudet* (1886), 11 Q.L.R. 239, 241; *Beaudet v. North Shore R.W. Co.* (1887), 15 S.C.R. 44. In the Supreme Court of Canada the objection in that case on which the railway company relied was not overruled, but was held not to be sufficiently proved: see judgments of Gwynne, J., and Henry, J., 15 S.C.R. at pp. 61, 65. I refer also to *Re Burnett and Town of Durham* (1899), 31 O.R. 262; *Reade v. Dutton* (1836), 2 M. & W. 69; Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, pp. 547, 720, 723. This was not a reference to arbitration by consent of the parties, but was forced upon the railway company by the provisions of the Act, which must, therefore, be strictly construed. The learned Chief Justice of the Common Pleas thought that the railway company had waived the point by being present at the arbitration, but it was not in their power to waive the provision in question, and the respondents are not assisted by reference to sec. 205 of the Act, as there has been no substantial compliance with sec. 204.

[MIDDLETON, J., thought it was a matter of some doubt whether the Court had jurisdiction to make the order in question.]

W. *Proudfoot*, K.C., for the bondholders of the Horseshoe Quarry Co., said that the question of jurisdiction which had just been referred to was not raised by the notice of motion and had not been discussed in the Court below, and he was consequently not prepared to argue the point at present. As to the other point which was argued in the Court below, and on which the decision there was given, it was submitted that the decision of *MEREDITH*, C.J.C.P., was right, and that the railway company had waived any right to take the objection now pressed by them, which was, moreover, cured by the provisions of sec. 205.

R. S. *Robertson*, for the London and Western Trusts Co., liquidators of the Horseshoe Quarry Co., referred to sec. 47 of R.S.O. 1897, ch. 62, which he thought was broad enough to cover arbitrations under the Railway Act. Reference was also made to sec. 13 of the same Act. The other point, which was the only one relied on by the appellants, was highly technical, especially in view of the fact that the railway company had appeared on the arbitration and asked for an enlargement. He referred to *Robinson v. Robinson* (1876), 24 W.R. 675, and *Bignall v. Gale* (1841), 2 M. & G. 830.

Moss, in reply, on the question of jurisdiction, referred to *In re Horton and Admaston and Canada Central R.W. Co.* (1880), 45 U.C.R. 141, *per* Galt, J., whose decision, however, was merely *obiter*.

[At the conclusion of the argument, *BOYD*, C., said that the Court was prepared to affirm the order appealed against, so far as the merits were concerned, but would further consider the question of jurisdiction.]

December 15. *BOYD*, C.:—The Dominion statute as to railways provides no method of enforcing the award by application to the Court. An appeal is provided for, which is to be conducted according to the practice and procedure, as nearly as may be, regulating appeals from an inferior Court. It is further provided that the right of appeal shall not affect the existing law and practice in any Province as to setting aside awards: R.S.C. 1906, ch. 37, sec. 209 (2), (4).

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The award, as confirmed on appeal, is to be final and conclusive (sec. 197), and all the papers, depositions, and exhibits are to be filed with the records of the Court (sec. 203). That is the High Court of the Province in Ontario (sec. 2 (7)). Section 220 provides that any proceeding relating to the ascertainment or payment of compensation, etc., shall, if commenced in a Superior Court having jurisdiction, be continued therein.

These provisions recognise the supervisory and directory powers of the Provincial Courts, and are also a recognition that the existing law and practice of the Province as to setting aside awards is not interfered with. The argument *à silentio* is very strong, that there is no interference with the existing law and practice of the Province as to enforcing awards.

The absence of any provision for enforcing the award in the Dominion statute leaves it open to refer to Provincial legislation.

In the Arbitration Act, now found in 9 Edw. VII. ch. 35, it is declared, in sec. 4., that this Act shall apply to every arbitration under any Act passed before or after the commencement of the Act as if the arbitration were pursuant to a submission, except so far as this Act is inconsistent with the Act regulating the arbitration or with any Rules or procedure authorised or recognised by that Act. And sec. 14 provides that an award may, by the leave of a Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.

The former practice in Equity was, that by making the submission a rule of Court the Court became possessed of the matter, and thereafter an order to pay, to be followed by execution, would be granted whenever an action at law would lie upon the award: *Armstrong v. Cayley* (1870), 2 Ch. Ch. 163. This formality is now dispensed with—by the very appeal to the Court it is seised of the whole matter, and that same Court may well act summarily in enforcing the final award, which has been declared valid as against all objections on appeal. This term of the decision now under appeal is to be affirmed as a most convenient and satisfactory practice.

The result is, that the order of the Chief Justice of the Common Pleas is affirmed on all points, with costs to be paid by the railway company.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—Upon the argument we determined that the omission to name a day before which the award was to be made did not invalidate the award (see sec. 204, Dominion Railway Act). The naming of a day is not a condition precedent to the attaching of jurisdiction. The sole effect of the naming of the day is to fix a time for the award, and, if the award is not made within the limited time (or the extended time, if an extension is granted), is to ascertain the sum offered as the sum to be paid. This result flows from failure to award within a time fixed, and not from failure to fix a time. The provision is one in favour of the railway company, and was waived by proceeding with the arbitration.

We reserved judgment upon the question whether the Ontario Arbitration Act applied to awards under the Dominion Railway Act so as to confer jurisdiction to entertain a summary application to enforce the award.

In my view, the Act applies to all awards where the particular Act does not itself prescribe a mode of procedure. The Dominion Act provides for appeals, but does not provide machinery for the enforcement of the award. The Provincial Court must be resorted to, and all the modes of attack, by summary application, as well as by action, are open to the applicant. There is no reason for discriminating. Section 4 of the Ontario statute 9 Edw. VII. ch. 35 removes obstacles that existed under earlier legislation.

Reference may be made to *Rhodes v. Airedale Drainage Commissioners* (1876), 1 C.P.D. 402; *In re Colquhoun and Town of Berlin* (1879), 44 U.C.R. 631; *Re City of Toronto Leader Lane Arbitration* (1889), 13 P.R. 166.

The appeal should be dismissed with costs.

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Execution—Seizure of Ship under Fi. Fa.—Ship Wrongfully Brought by Execution Creditor into Sheriff's Bailiwick—Foreign Waters—Trespass—Public Policy—International Law—Ashburton Treaty, art. VII.—Abuse of Process of Court.

The defendant, having a judgment against the plaintiffs for the recovery of a sum of money, and having a writ of *fi. fa.* in the hands of the Sheriff of Essex, procured or connived at the cutting loose of a foreign vessel owned by the plaintiffs, lying at a dock upon the foreign side of the river St. Clair, and the bringing of the vessel into Canadian waters, within the bailiwick of the Sheriff, for the express purpose of enabling the Sheriff to make a seizure, which he did under the defendant's writ:—*Held*, that what the defendant did or procured to be done was against public policy, and was a trespass, if not a crime, and the defendant ought not to be permitted to take advantage of his own wrong; and so the vessel was not exigible in execution, and the seizure was an abuse of the process of the Court, and should be released.

Semble, that, if art. VII. of the Ashburton Treaty applied to the channel between Detroit and Windsor, it would not prevent the seizure of a foreign vessel properly within the bailiwick of the Sheriff of Essex.

THIS was an issue in which the plaintiffs affirmed and the defendant denied that the ship "Houghton," seized or taken on or about the 19th April, 1910, by the Sheriff of the County of Essex, under an execution issued in *May v. Houghton*, was improperly brought by the defendant, or with his connivance by others, into the bailiwick of the Sheriff of the County of Essex, or came within the bailiwick of the Sheriff of the County of Essex, under such circumstances that the ship was not exigible in execution, and that the seizure was an abuse of the process of the Courts and should be released.

Application for an issue was made during the lifetime of Henry Houghton, one of the defendants in the original action, and, he dying, the action was revived by his administratrix, and she was made one of the plaintiffs in the issue.

November 29. December 1 and 2. The issue was tried at Sandwich before CLUTE, J., without a jury.

A. H. Clarke, K.C., for the plaintiffs.

E. S. Wigle, K.C., for the defendant.

December 15. CLUTE, J.:—At the close of the trial I found the following facts:—

There was a collision in Canadian waters between a ship owned by Henry Houghton and the plaintiff Degg, and one owned by the present defendant May. An action was brought in the High Court for Ontario, by May, the defendant herein, against Houghton and Degg, in which May recovered judgment for \$10,000. The evidence is quite clear, and indeed it was admitted by May, that, after obtaining judgment and the execution in the action of *May v. Houghton*, he made many endeavours in order to enable the Sheriff to make a seizure of the boats of the defendant Houghton while in Canadian waters. On one occasion, after seizure had been made, the Sheriff's officer and the boat were carried off to the other side. The defendant had what he called scouts or persons active in his service to give him information. The ship now in question was lying in a slip on the American side, and, in order to allow another boat to enter, she was taken outside prior to the 19th April last, and I find securely fastened. On the night of the 19th April, or rather the morning of the 20th, Captain Ruelle was notified by telephone from the Canadian Pacific Railway dock, which is situated about 500 feet north of the Houghton dock, where the ship was moored, that the ship "Houghton" was afloat. He did not act upon this information, but somewhat later, between four and five o'clock a.m., he received a further message from the coal dock on the Canadian side, about a mile below the Houghton dock, that the ship "Houghton" was there aground, and thereupon, instead of notifying the owners of the "Houghton," he, being a friend of Captain May, immediately notified him of the fact, with a view, as he frankly says, that the Sheriff could be advised of the fact, and thereupon and for that purpose he called upon Captain May, and they came over to the Canadian side and notified the Sheriff, at about 6.20 by Canadian time, of the fact that this ship was lying within Canadian waters.

The first question is as to whether or not the vessel was set adrift or broke loose by reason of the storm. She was, as I have said, securely and properly fastened or tied to the wharf. There was a strong wind, perhaps what might be called a half-gale,

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from 23 to 27 miles an hour, by the recorded time. The rope found upon the boat, immediately upon the Sheriff's officer taking possession, was properly coiled. There is no evidence of broken ropes upon the dock or upon the vessel. There is no indication upon the vessel from the position or condition of the ropes to indicate that she had broken away. The fact that it was after midnight, and that she was loose and drifting away, and that she was seen in the river, from the wharf, at the opportune time, with the other facts, lead me to the irresistible conclusion that she was cut adrift and did not break away. The night was dark and stormy, and a vessel could be seen without lights but a short distance from shore. She had no light, yet some person knew that she was loose. Just at that particular time—two o'clock in the morning—Ruelle received a telephone message. All the circumstances together lead me to the conclusion, without the least doubt, that the vessel was cut away for the purpose of having her drift to the opposite shore. It so happened upon that night that the wind was blowing from a northerly direction, and the current and the wind would naturally cast her upon the Canadian shore at just about the point where she was found. In other words, advantage was taken of the wind and current to place her in a position where she might be seized. I find as a fact that that was done for the purpose of enabling seizure to be made. I am unable to say from the evidence that it was done by direction of Captain May. I think it was done by his friends whom he had on the look-out, and who were acting for and on his behalf, after possibly being expressly told so to do. I think it is not going too far to say that it was expected that it would occur.

I did not at the close of the trial finally pronounce upon the evidence of Mrs. Baker, as I desired a further perusal of that evidence before doing so, and I reserved the question of law for further consideration.

Mrs. Baker, whose evidence was taken on a commission, was aboard the "Gogebic" as cook; the "Gogebic" was lying at the dock on the outside of the "Houghton" a few days before and at the time the "Houghton" left the dock. She is not able to fix the time, but she remembers the circumstances; while on board the "Gogebic" she saw Captain May there and heard him speak

to another man about the "Houghton." They were on the "Gogebic" at the time; they came on the aft part of her, and they were talking about the "Houghton" going out, and she heard one of them say, "If we let her forward lines go, she would go out easily." She says that was the same afternoon—that the boat went out in the following morning. Captain May positively denies that he was on the "Gogebic" the day preceding the morning that the "Houghton" went out; but he admits that he was there the day before, and he denies the conversation.

I see no reason to reject the evidence of Mrs. Baker as to what she overheard. She knew Captain May, and could not easily be mistaken. It may be that it was the day before, but that makes no difference. The defendant May was there on more than one occasion, and, from all the surrounding circumstances and from what afterwards took place, it is such a conversation as would very likely take place.

Upon the whole evidence, I find as a fact, that the vessel was cut loose either by the orders of Captain May, or with his connivance.

There was also evidence of Charles H. Hampson, assistant foreman of the Automobile Manufacturing Company. He says that he knew the steamer "Houghton;" that he saw her crossing the river at from 6.20 to 6.30 a.m.; and that he saw two men aboard of her. He is unable to fix the date, but he heard at noon of the same day that the "Houghton" had been cut loose. He says that he recognised the boat as the "Houghton;" that he had frequently seen her.

William Langley, who worked at the same place, also saw her at the same time, and said, "There's the old 'Houghton.'" He knew her.

I think it altogether likely that the men who cut her loose stayed with her until she landed near the place where they telephoned from the Canadian side at four or five in the morning. But I think it exceedingly unlikely that these men would have remained upon the boat until daylight, and so run the risk of being caught and punished for the offence of having cut her loose. The probability is that the men whom Hampson and Langley saw were the Sheriff's officers, as, according to the

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Sheriff's officer, Captain May awakened him at twenty minutes to six (Canadian time), and he immediately dressed and went down. As there is a difference of one hour between Canadian and American time, and the witnesses above referred to, who saw the two men upon the boat, spoke from American time, I think it altogether probable that the men whom they saw were the two Sheriff's officers. The fact that the boat seemed to be out in the river is accounted for by the fact that the boat stranded on the channel bank, which is between 200 or 300 feet from the Canadian shore.

I do not know that it makes any difference in the result, as, if the boat was cut loose, it is exceedingly probable that she would be guided to the Canadian side; and that she was guided is further evidenced by the fact that the telephone message advising Captain Ruelle that the "Houghton" was stranded on the Canadian side was sent from the coal docks, where there is a telephone upon the docks a few hundred feet above the place where the "Houghton" stranded.

Taking the fact then to be that the vessel was cut loose and brought from the American side to Canadian waters for the express purpose of enabling the Sheriff to make a seizure, was the boat liable to seizure?

No direct authority was cited on either side. Reference was made to Smith's Leading Cases, 11th ed., vol. 1, p. 117, where *De Gondouin v. Lewis* (1839), 10 A. & E. 117, is considered. There a custom-house officer, without demand, or any circumstance to justify the use of force, violently took contraband goods out of the plaintiff's hands. An action of trespass was brought for the seizure, but not for the assault. The Court held that the fact of the goods being forfeited was an answer to the action, notwithstanding that, if the plaintiff had sued for the assault, there would have been no justification; and the learned author observes: "And the reason of the thing, as well as the authority of Coke and of Littleton, seems to be with the decisions, for the execution creditor not taking part in the execution has been guilty of no wrong, and the maxim *nullus commodum capere potest de injuriâ suâ propriâ* (see Co. Litt. 148b) is therefore not violated by holding so much of the acts of the Sheriff as was

for the benefit of the execution creditor valid, and the rest illegal.”

Reference is also made to the old case of *Yates v. Delamayne* (1777), Bac. Abr., Execution (N), where the Court set aside an execution levied on the defendant's goods in his dwelling-house, because the officer forcibly broke into the house to execute the writ. The learned author then proceeds: “That case, though hard it may be considered, if interfering with a strict legal right of the execution creditor, is perhaps not irreconcilable with the doctrine under discussion; because it is quite consistent with the validity of the execution in point of law, that the Court, to prevent abuse of its process and danger of collusion between execution creditor and Sheriff, should, in the exercise of its summary jurisdiction, undo the proceedings, according to the principle acted on in *Barratt v. Price* (1833), 9 Bing. 566, and other cases, and recognised in *Hooper v. Lane* (1857), 6 H.L.C. 443.”

It is a very old maxim of the law that no man can take advantage of his own wrong: Co. Litt. 148*b*; Broom's Legal Maxims, 7th ed., p. 227. In the latter work it is observed that this maxim, which is based on elementary principles, is fully recognised in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure; and an illustration is given in *Lee v. Cooke* (1858), 3 H. & N. 203, where it was held that A., on whose goods a distress had been levied, and who by his own misconduct prevented the distress from being realised, could not complain of a second distress as unlawful. So B., into whose field cattle had strayed through defect of fences which he was bound to repair, could not distrain such cattle damage feasant in another field, into which they had got by breaking through a hedge, which he had kept in good repair, because B.'s negligence was *causa sine qua non* of the mischief: *Singleton v. Williamson* (1861), 7 H. & N. 410.

In my opinion, it would be against public policy to permit a seizure under circumstances such as are disclosed in this case. It would, I think, create international trouble if property was permitted to be brought wrongfully by an execution creditor from a foreign territory within the bailiwick of a Sheriff for the

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purpose of a seizure, no matter whether the execution creditor was implicated in the removal or not.

In the present case, upon my findings, there was a trespass committed, if not a crime, and, as the defendant seeks to take advantage of this wrongful act, he ought not to be permitted to do so: *Egerton v. Earl Brownlow* (1853), 4 H.L. C. 1, at p. 196; 32 Cyc. 1251, where the American cases are collected.

There was a further objection taken by Mr. Clarke, that, under the Treaty of 1842 between Great Britain and the United States, American vessels have certain rights thereby guaranteed to navigate the waters of the river St. Clair, passing through Canadian territory without molestation or hindrance, and that under that Treaty the vessel was not exigible in execution. The Treaty commonly called the Ashburton Treaty, ratified the 13th October, 1842, was not formally proven before me.

But, assuming that formal evidence of the Treaty would be permitted to be put in, upon request, I refer to art. VII., which is applicable in this case. I quote from the Compilation of Treaties in Force, prepared under resolution of the Senate at Washington of the 11th February, 1904:—

“It is further agreed that . . . the channels in the river Detroit on both sides of the Island Bois Blanc, and between that Island and both the American and Canadian shores; and all the several channels and passages between the various Islands lying near the junction of the river St. Clair with the lake of that name, shall be equally free and open to the ships, vessels, and boats of both parties.”

It is not clearly apparent that this article of the Treaty applies to the channel between Detroit and Windsor; but, if it did apply, I do not think it could help the plaintiffs if the plaintiffs' property was properly within the bailiwick of the Sheriff. The Treaty would not, I think, prevent the same being seized.

Since the argument Mr. Wigle has referred me to a couple of cases in the United States Federal Court: *The Winnebago* (1907), 205 U.S. 354, 362, and *Davis v. Cleveland, etc., R.W. Co.* (1910), 217 U.S. 157. I do not think these cases throw any light upon the present question. They have relation to the Inter-State Commerce Law, which provides for through routes, and exempts in certain cases cars from attachment.

The plaintiff, in my opinion, is entitled to a declaration that the ship "Houghton" seized and taken on or about the 19th April, 1910, by the Sheriff of the County of Essex, under an execution issued in the action of *May v. Houghton*, was improperly brought by the defendant, or with his connivance, into the bailiwick of the Sheriff of the County of Essex, and that the same came within said bailiwick under such circumstances that the said ship was not exigible in execution, and the said seizure was an abuse of the process of the Courts, and the said ship should be released.

The plaintiffs are entitled to the costs of the interpleader order and incident thereto, and the extra costs occasioned by the postponement of the sale, and of the trial of the issue and of the judgment.

[Affirmed by a Divisional Court on the 16th February, 1911.]

[DIVISIONAL COURT.]

WARREN GZOWSKI & Co. v. FORST & Co.

Evidence—Telephone Conversation between Parties—Testimony of Person Hearing Words of one Party—Admissibility—New Trial.

Clute, J.

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It appeared in evidence that there were communications by telephone, on a given day, at a given time, between one of the plaintiffs and one of the defendants in regard to the matters in question in the action; but what was said by one was denied by the other. It was sought to elucidate what was said by the defendant by calling witnesses who heard his words as spoken into the telephone receiver, though the witnesses could not affirm to whom he spoke or that he was in fact speaking to any person:—

Held, that the evidence of the proposed witnesses was relevant, and therefore admissible, though the value of it might be little or nothing. *McCarthy v. Peach* (1904), 186 Mass. 67, approved.

Judgment of SUTHERLAND, J., 2 O.W.N. 222, set aside; and a new trial ordered.

APPEAL by the defendants from the judgment of SUTHERLAND, J., the trial Judge (noted 2 O.W.N. 222), in favour of the plaintiffs, for the recovery of \$2,082 as damages, in an action for breach of a contract with respect to 10,000 shares of Temiskaming Mining Company stock, of which the defendants refused to take delivery, as the trial Judge found. There was a

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counterclaim by the defendants for an account or damages, which was dismissed by the trial Judge.

The principal ground of appeal was that evidence offered at the trial had been improperly rejected by the trial Judge, who tried the action without a jury. The evidence in question was the testimony of witnesses who, it was said, had heard what was said by one of the defendants in a conversation over the telephone with one of the plaintiffs, though the proposed witnesses could not say to whom the defendant was speaking.

December 13. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

A. *McLean Macdonell*, K.C., for the defendants, was requested by the Court to confine his argument in the first place to the question of the improper rejection of evidence at the trial. The plaintiffs base their claim in this action upon Gzowski's statements in his evidence as to Forst's conversation over the telephone on particular occasions, and the defendants' counsel was entitled to put in evidence which would tend to complete those statements. Forst's evidence as to the remaining part of the conversation, with his version of its effect, which was different from Gzowski's, was relevant, and the evidence of the two witnesses who were present at the time was admissible in establishing what the statements of Forst exactly were upon the occasion, as well as completing the part of Forst's statement which was testified to by Gzowski. The exclusion of this evidence by the learned trial Judge was improper, and entitled the defendants to a new trial. Reference was made to the following authorities and cases: *Wigmore on Evidence*, ed. of 1905, vol. 3, sec. 2115, and cases there cited; also supplement, vol. 5 (1908), sec. 669 and par. 2115, and *McCarthy v. Peach* (1904), 186 Mass. 67, which is cited there with approval, and also in *Am. & Eng. Ann. Cases*, vol. 1, p. 801.

[Counsel was stopped at this point.]

F. *Arnoldi*, K.C., for the plaintiffs. On the whole case it is clear that the evidence tendered was immaterial and irrelevant. If the call were proved to have been made at the telephone conversation on the 28th June, it would not affect the judgment

pronounced at the trial. It matters not whether the transaction was, as the plaintiffs assert, one of purchase on a three months' buyer's option, or a loan, as the defendants contend. In either case the defendants called the stock and refused to accept, and so put an end to the contract and gave the plaintiffs the right to sell. The tendered evidence is hearsay, and not part of the *res gestæ*, and it is wholly inadmissible. To establish the rule contended for by the defendants would open the door wide to the grossest fraud. A pretended conversation in the presence of third parties could be conducted for the purpose of securing their evidence when there was nobody listening at the other end of the telephone. It all comes back to the question of the evidence of the man who was addressing the telephone. Nobody can ascertain that he was at the time speaking to any one at the other end, and therefore to attempt to prove such a fact by third persons must be on his information and no higher, and such evidence cannot escape the rule which excludes hearsay. If such a rule as the defendants contend for has been followed in the United States, it is to be hoped that it will not be allowed to prevail in this country.

Macdonell, in reply, argued that the points in the case were covered by the *McCarthy* case, the reasoning in which was sound and should be adopted by the Court.

December 17. *Boyd, C.*:—Communications by telephone are of common occurrence in business, as in other affairs, and the law of evidence is to be fitted into the questions arising by this new method of intercourse. The conversation at each end of the line is as oral converse, and what is said must be admissible though one party may be unable to recognise the voice of the speaker at the other end. Various degrees of weight or relevance may be given to what is so communicated and received, but the estimate of such evidence it to be left to the tribunal of trial.

In this case it is in evidence that there were communications, on a given day, at a given time, between the parties; what was said by one is denied by the other. It is sought to elucidate what was said by the defendant by calling witnesses who heard his

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words as transmitted through the wire, though they cannot affirm to whom he spoke: it seems to me that such evidence is relevant, and therefore admissible—though the value of it, may be little or nothing in the judgment of those who pass upon the facts of the case and the points in difference.

Take the case of mailing a letter, which is lost, and which it is alleged was never received, or, if received, that it was of a different tenor from what the sender alleges—would it not be competent to call one who heard the letter read over before its being mailed, to prove what were its contents? That would leave open the question whether the letter went astray or was never received by the person to whom it was addressed: but it would be important evidence as to the contents of the letter, which is one of the matters in issue.

In this case, *primâ facie*, there was a conversation going on at the telephone; part of this, *i.e.*, the defendant's side of the conversation, was heard by the proposed witnesses, and that they can depose to as competent evidence—though it may be there was no one at the other end, so that the alleged conversation was a pretence, or that there was some one speaking other than the person sought to be affected, and so no weight could be given to what was heard by the proposed witnesses. These considerations would not go to the exclusion of the statements, but to their pertinence in view of contradictory or explanatory facts. According to the contention of the defendants, what was heard by these persons would be part of the *res gestæ*: yet it might all go for nothing and be displaced by the plaintiffs.

In a case decided in 1894, *Miles v. Andrews*, 153 Ill. 262, it was held "that it is not error to permit a bystander in a telephone office to testify to the part heard by him of a conversation by telephone, such conversation being shewn *aliunde* to have been between parties to a suit, and upon the subject-matter thereof." That seems to be a right view to take, and these conditions appear to exist in the present case. So in the later case in 1904, before a strong Court, *McCarthy v. Peach*, 186 Mass. 67, it was held that where the plaintiff in an action had testified to a conversation had by him with the defendant over the telephone, a witness might properly be allowed to testify what he heard the

plaintiff say as a part of such conversation, though the witness does not know of his own knowledge that the other party was the defendant, or that there was any other party, or that the defendant heard what was said. In these circumstances, it was for the jury to say whether the alleged conversation was real or fictitious. The above cases have been generally followed in the American Courts, and a collection of cases may be seen in *Planter's Cotton Oil Co. v. Western Union Telegraph Co.* (1906), 6 L.R.A.N.S. 1180, at p. 1182.

I have come to the conclusion that the evidence rejected should have been received for what it was worth, and that there should be a new trial on this ground. Costs will be reserved to be dealt with by the trial Judge.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—The judgment in *McCarthy v. Peach*, 186 Mass. 67, commends itself to me and leaves little to add. If the question were the contents of a written communication from one party to the other, which had been lost, can any one doubt that the evidence of a stenographer who had written the letter would have been received, and that he would have been permitted to testify to its contents, even though he had not seen it signed and did not know that it had been delivered? The party would himself shew the signing of the letter as written, and a messenger might shew the delivery; but the one link in the chain would be strengthened—the link that might otherwise have appeared the weakest—by the independent recollection of a disinterested witness as to the exact wording of the contents—a recollection possibly fortified by the production of the contemporaneous notes from which originally written. There is always danger of fraud and perjury in all evidence, but in the search after truth it is better to receive all evidence that is properly admissible and trust to the safeguards afforded by the ordinary sanctions and cross-examination. In each case it is a question of the weight to be given to such corroborative evidence in the light of all the circumstances. If, for example, a witness were present at the precise time at which a conversation ad-

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mittedly took place over a telephone and heard what was said by one of the parties, and the surrounding circumstances were such as to satisfy the Court that he heard one side of the conversation which actually took place, I cannot well imagine evidence which might be more helpful—under other circumstances the evidence might be of little value.

What was said by the defendant to the plaintiff was a fact to be proved at the trial. That certain words were spoken by the defendant is partial proof—this is testified to by the defendant and the witness; that these words were spoken to the plaintiff must also be shewn—this can be proved by the plaintiff himself.

New trial ordered.

[DIVISIONAL COURT.]

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RICE v. TORONTO R.W. Co.

Street Railways—Injury to and Death of Person Crossing Track—Negligence—Excessive Speed of Car—Contributory Negligence—Crossing behind Car without Looking for Approaching Car—Joint Negligence—Ultimate Negligence—Findings of Jury—Costs.

R. alighted from an east-bound car of the defendants on the south side of Gerrard street, in the city of Toronto, and in attempting to cross the north track of the defendants, opposite the gate of the Toronto General Hospital, which he was about to visit, he was struck by a west-bound car and so injured that he died.

In an action by R.'s executors to recover damages for his death, the jury, in answer to questions, found: that R.'s injuries were caused by the negligence of the defendants, which consisted in excessive speed; that R. could by the exercise of reasonable care have avoided the accident; that R. was negligent "by not looking for approaching car;" that the motorman of the west-bound car, after he became aware, or, if he had exercised care, ought to have been aware, that R. was in a position of danger, could have prevented the accident by the exercise of reasonable care; and that in that respect the motorman's negligence consisted in "too great a speed:"—

Hold, that, as the primary and ultimate negligence of the defendants were one and the same—excessive speed—and as that negligence was concurrent with the negligence of the deceased, there could be no recovery.

No question of ultimate negligence arose upon the findings of the jury.

Upon the findings of the jury, the action was dismissed, but without costs.

Per Boyd, C.:—At places like the Hospital the cars should not be driven at such a rate as to imperil those who have to cross the track in the visitation of the sick.

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the plaintiffs, the executors of J. J. Rice, deceased, in an action for damages for his death.

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The deceased alighted from an east-bound car of the defendants opposite the gate of the Toronto General Hospital, in Gerrard street, in the city of Toronto, and, in attempting to cross the north track of the defendants, was struck by a west-bound car and killed.

The questions left to the jury and their answers were as follows:—

Q. 1. Were the deceased's injuries caused by the negligence of the defendants? A. Yes.

Q. 2. If so, in what did such negligence consist? A. Excessive speed.

Q. 3. Could the deceased by the exercise of reasonable care have avoided the accident? A. Yes.

Q. 4. If he might, in what respect was the deceased negligent? A. By not looking for approaching car.

Q. 5. If, after he became aware, or, if he had exercised care, he ought to have been aware, that the deceased was in a position of danger, could the motorman of the west-bound car have prevented the accident by the exercise of reasonable care? A. Yes.

Q. 6. If you answer "yes" to question 5, in what respect was the motorman negligent? A. Too great a speed.

Q. 7. At what sum do you assess the plaintiffs' damages? A. \$1,000.

These findings were made and the judgment in favour of the plaintiffs given at the second trial of the action, the Court of Appeal (1 O.W.N. 912) having directed a new trial upon appeal from the judgment at the first trial.

December 14. This appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

D. L. McCarthy, K.C., for the defendants. There is no claim in the pleadings, and no evidence, upon which a finding of ultimate negligence on the part of the defendants can be based. The case should, therefore, have been withdrawn from

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the jury, and in any event their finding on the question of contributory negligence cannot stand, in view of the evidence and the charge of the learned trial Judge. The following cases were referred to: *Hinsley v. London Street R.W. Co.* (1907), 16 O.L.R. 350; *Brenner v. Toronto R.W. Co.* (1907-8), 15 O.L.R. 195, 40 S.C.R. 540; *Toronto R.W. Co. v. Mulvaney* (1907), 38 S.C.R. 327; *Reynolds v. Thomas Tilling Limited* (1903), 19 Times L.R. 539, affirmed 20 Times L.R. 57; *Radley v. London and North-Western R.W. Co.* (1876), 1 App. Cas. 754; *Butterly v. Mayor, etc., of Drogheda*, [1907] 2 I.R. 134.

John MacGregor, for the plaintiffs. The fact that the car was going at an excessive rate of speed, and was gaining speed all the time, sufficiently supports the findings of the jury in favour of the plaintiffs, on which the Court should put as generous a construction as they possibly can. If the car had been going at a reasonable rate of speed, the deceased would have avoided all danger. The case comes within the principle laid down in *Davies v. Mann* (1842), 10 M. & W. 546, which was followed in the *Radley* case. The following cases were also referred to: *Ewing v. Toronto R.W. Co.* (1894), 24 O.R. 694; *Toronto R.W. Co. v. Gosnell* (1895), 24 S.C.R. 582; *Haight v. Hamilton Street R.W. Co.* (1898), 29 O.R. 279; *Tinsley v. Toronto R.W. Co.* (1907), 15 O.L.R. 438, *per* Magee, J., at pp. 447 448, and *per* Moss, C.J.O., in same case (1908), 17 O.L.R. 74, at p. 77; *Halifax Electric Tramway Co. v. Inglis* (1900), 30 S.C.R. 256, *per* King, J., at p. 261.

McCarthy, in reply, agreed that, if any negligence was shewn as the cause of the accident, it was the joint negligence of the deceased and the defendants, and the latter were under no liability.

December 17. BOYD, C.:—According to the findings of fact by the jury, the defendants were guilty of negligence in running their cars at an “excessive speed:” the deceased was also guilty of negligence by not looking for the approaching car: and the motorman, after he became aware of the deceased’s danger, could have prevented the accident by the exercise of reasonable care, but he was negligent therein because of the “too

great speed." I read these expressions as to negligent speed as meaning the same thing: the speed of the car was throughout "too great" or "excessive." And the last answer, read in the light of the evidence, indicates (as said by Moss, C.J.O., in *Hinsley v. London Street R.W. Co.*, 16 O.L.R. 350, 352) their opinion that the motorman, apprehending the situation and doing everything in his power, found it impossible to stop in time to avoid the impact of the car because of the extreme rate of speed.

There was the one act of negligence throughout on the part of the defendants, and it was the plaintiff's own want of care that exposed him to the stroke of the car. He saw or might have seen, had he looked, the rapidly approaching car, and he goes forward to the track on which it was coming and is struck because of the speed at which it was propelled. He undertakes, by his want of care in looking, to go over the crossing at his peril, and is run down by the negligence of the defendants. That is, the accident is the result of joint negligence, his own and the defendants'—and, in such conditions, the plaintiff fails because he is himself to blame for exposing himself to the danger.

The primary and ultimate negligence of the defendants is one and the same (excessive speed). There is no evidence of other negligence than that of excessive speed, which occasioned and was the direct cause of the injury. But that negligence was concurrent with the negligence of the deceased; and in cases of joint negligence of plaintiff and defendant there can be no recovery for the plaintiff, according to well-settled rules of English law.

Another way of putting it is, that excessive speed was the risk which the deceased assumed in the attempt to cross the track, and his going on the track was the main and decisive cause of the injury which resulted in death.

I would not give costs, for I think it is a monstrous thing that at places like the entrance to the General Hospital the cars should be driven at such a rate as to imperil those who have to cross the track in the visitation of the sick. The car stopping to land people at the Hospital gate should be a signal for any

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other approaching car to come to a halt till the car is unloaded of its passengers.

After writing the foregoing, a further memorandum of cases was handed in to me by Mr. MacGregor. As to these I may say that the observations of Mr. Justice Anglin, concurred in by Mr. Justice Clute, are not to be regarded as the real judgment in the particular controversy in *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423. The judgment of this Divisional Court was overruled in appeal, 15 O.L.R. 195, and in further appeal to the Supreme Court, 40 S.C.R. 540.

The discussion as to "ultimate negligence," *i.e.*, to the presence or absence of a new negligent act by the defendants, in addition to or in continuation of their first act of negligence, does not appear to me of importance upon the facts of this case. The analysis has not met with approval in the British Columbia Court: see *Snow v. Crow's Nest Pass Coal Co.* (1907), 13 B.C.R. 145, at p. 155. Nor do I find that *Scott v. Dublin and Wicklow R.W. Co.* (1861), 11 Ir. C.L.R. 377, approved in 13 O.L.R., has been noticed in any text-book or subsequent judgment, though I cannot say my search has been exhaustive.

My opinion is not changed by the subsequent references.

LATCHFORD, J.:—This is not a case in which ultimate negligence on the part of the defendants can be invoked in support of the verdict. The excessive speed found to constitute the defendants' negligence was but a single continuing act. It does not appear from the evidence that the motorman realised, or ought to have realised, in time to avert the accident, the position of peril in which the deceased negligently placed himself. Upon the present state of the law, the appeal must, in my opinion, be allowed; but, in the circumstances, without costs.

MIDDLETON, J.:—There is much said upon the subject of "ultimate negligence" that I cannot at present accept, but this case appears to me to be simple enough. As said by Vaughan Williams, L.J., in *The Sans Pareil*, [1900] P. 267, after discussing the much commented on decision of *Radley v. London and North Western R.W. Co.*, 1 App. Cas. 754, "it all

comes back to the common law rule, that the plaintiff must prove the negligence of the defendant to have been the cause of the accident." The plaintiffs have proved the negligence of both parties to have caused the accident, and so fail. If the finding of the jury in answer to questions 5 and 6 means more than this, then there is no evidence to support the finding.

Upon the danger of the deceased, occasioned by his negligence, it is true, becoming apparent to the motorman, it then became his duty to take all reasonable steps to avoid, if possible, the impending accident. If the motorman neglected to discharge this duty, or was unable effectually to discharge it, either by reason of his own negligence, or by reason of any negligence of the defendants, they would be liable. This duty arose as soon as the peril of the deceased became apparent to the motorman, or should have become apparent to a reasonably careful man in his position, and quite independent of any "original negligence." The duty to be ready to meet such an emergency always existed. A careful reading of the cases will, I think, shew that this is the law applicable. Applying this test, there is nothing in the evidence to justify a verdict for the plaintiffs. The degree of care imposed upon the defendants by the conduct of the deceased is well put in the judgment from which I have already quoted: "It is not the rule that those who have to meet the negligence of the plaintiff have to act up to counsels of perfection. The very words of the rule 'ordinary care and prudence' assume a margin of deviation from counsels of perfection." The same standard is thus set up as is applicable to cases of contributory negligence.

The issue as to a defective system in permitting a car to travel at full speed past a standing car, particularly when the passengers alighting had to cross the other track, does not seem to have been raised, or, if raised, is found against the plaintiff.

Appeal allowed and action dismissed without costs.

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WILSON LUMBER CO. v. SIMPSON.

Dec. 19.

Vendor and Purchaser—Contract for Sale of Land—City Lot—Misstatement as to Depth—"More or Less"—Deficiency—Innocent Mistake—Specific Performance—Compensation.

In an agreement for the sale of land by the defendant to the plaintiffs, the land was described as "the premises situate on the north side of R. street, in the city of T., and known as No. 250 R. street, having a frontage on R. street of 36 feet, more or less, by a depth of 110 feet, more or less, to a lane." The lot was bounded on two sides by streets, and in the rear by a lane, so that its limits were apparent. In fact, the depth was only 98 feet 6 inches. The defendant acted in good faith in describing the lot as having a depth of 110 feet, more or less, and the plaintiffs believed that the depth was about 110 feet. The purchase-price was a bulk sum, not arrived at by an estimate of the value of the property at a price per foot:—

Held, that the words "more or less," added to the statement of the depth, controlled that statement, so that the plaintiffs were not entitled to compensation for the deficiency—the difference not being so great as to raise the presumption of fraud or gross mistake.

Noble v. Googins (1868), 99 Mass. 231, approved and followed.

Review of the English authorities.

THE plaintiffs sued for specific performance of an agreement made with the defendant on the 2nd February, 1910, for the sale by the defendant to them of a lot on Richmond street, in the city of Toronto.

December 5. The action was tried before MEREDITH, C.J.C.P., without a jury, at Toronto.

J. J. MacLennan, for the plaintiffs.

K. F. Mackenzie, for the defendant.

December 19. MEREDITH, C.J.:—The lot is described in the agreement as "the premises situate on the north side of Richmond street, in the city of Toronto, and known as No. 250 Richmond street, having a frontage on Richmond street of 36 feet more or less by a depth of 110 feet more or less to a lane, together with a right of way over said lane."

The lot is a corner lot, bounded on one side by Richmond street, on another by Duncan street, and on the third side by the lane mentioned in the agreement, and the depth of it, *i.e.*, the frontage on Duncan street, is 98 feet 6 inches, and not 110 as mentioned in the agreement.

The sale was effected through an agent of the defendant, who was aware that the plaintiffs contemplated pulling down the building which stands on the lot and erecting a row of five houses, each having a frontage of about 20 feet, with a 10-foot stairway leading to the upper storeys; and it is apparent, therefore, that the plaintiffs, in making their offer, were under the belief that the Duncan street frontage was about 110 feet.

The agents did not communicate to the defendant the information they had as to the purpose of the plaintiffs to erect the houses, and the defendant accepted the offer of the plaintiffs in ignorance of the use to which it was contemplated by them to put the lot.

The purchase-price agreed on was \$12,000, and was a bulk sum, and not a sum per foot for the frontage on either street, and the plaintiffs did not arrive at the bulk sum by an estimate of the value of the property at a price per foot.

The defendant acted in good faith in describing the lot as having a depth of 110 feet more or less, and he was led into that error from the lot having been assessed and described in the assessment notices which he received as of that depth.

The plaintiffs claim that they are entitled to specific performance, with compensation for the deficiency in depth of the lot, which they say should be fixed at \$1,500; and the defendant is willing to carry out the agreement, but disputes the right to compensation.

I was not referred to nor have I found any reported English or Canadian case in which, where, as in this case, in the description of the land which was the subject of the contract its depth was stated to be greater than its actual depth, but that statement was qualified by the words "more or less," it was held that the purchaser was entitled to enforce the contract and to claim a reduction of the purchase-price sufficient to compensate him for the deficiency.

There are, however, American cases in which the question has been considered and decided. Among these is the case of *Noble v. Googins* (1868), 99 Mass. 231, in which it was determined by the Supreme Judicial Court of Massachusetts that "in a written contract for the purchase of land for a gross sum, a description

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of the land by its boundaries, or the insertion of the words 'more or less,' or of equivalent words, will control a statement of the quantity of land, or of the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as naturally raises the presumption of fraud or gross mistake in the essence of the contract." In that case the property consisted of a wharf lot on Border street, described as bounded on one side by the shipyard of Paul Curtis and on the other by that of Donald McKay, and as "measuring about 220 feet on Border street, more or less," though the lot in fact measured only 170 feet on that street. After stating the facts, Gray, J., by whom the judgment of the Court was delivered, said that it was quite clear that, if the transaction had been completed by a conveyance describing the lot as it was described in the contract, neither party would be entitled to set the conveyance aside or to claim an increase or diminution of the stipulated price, and added: "The defendant contends that a different rule is to be applied to an executory contract for the sale of land, even for a gross price; and in support of this position relies on some English Chancery cases, from which it is difficult to extract any consistent principle." The learned Judge then referred to *Hill v. Buckley* (1811), 17 Ves. 394; *Winch v. Winchester* (1812), 1 V. & B. 375; *Townshend v. Stangroom* (1801), 6 Ves. 328; and *Portman v. Mill* (1826), 2 Russ. 570; and went on to say: "There could be no better evidence of the unsatisfactory state of the English law upon this point than the caution with which it is expressed by so acute, discriminating and profound a commentator and so eminent a Judge as Lord St. Leonards. 'Where the contract rests *in fieri*, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contains the words 'more or less,' or 'by estimation,' or even stronger words:'" citing *Sugden on Vendors*, 14th ed., p. 324.

Dart, in his work on *Vendors and Purchasers*, 7th ed., after stating the general rule to be that the purchaser will be entitled to compensation for a deficiency in quantity, though the estate

is not sold professedly by measurement (p. 675), adds, p. 676: "The qualifying expressions 'by estimation' and 'be the same more or less' are, however, in very general use; and the cases do not seem to define their precise effect."

In all the English cases referred to by Mr. Justice Gray the statement was as to the quantity of land contained in the parcel contracted to be sold.

In *Hill v. Buckley*, in the particular which was sent by the defendants' agent to the plaintiff's agent, which was the basis of the subsequent negotiation, certain woods, called the Kestle woods, including the Gulberry marsh (the property sold) were represented as containing 217 acres and 10 perches. There was in fact not that quantity by about 26 acres, though no deception was intended, the representation having been made through a mistake of the defendants' agent, and there was nothing from which it could be inferred that the plaintiff knew the real quantity. After stating these facts, the Master of the Rolls (Sir William Grant) said: "The particularity of the statement, descending to perches, would naturally convey the notion of actual admeasurement. Where a misrepresentation is made as to the quantity, though innocently, I apprehend, the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchase-money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity, which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain: therefore a ratable abatement of price will probably leave both in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known." I gather from the report that the contract of sale in which the negotiations resulted did not contain the qualifying words "be the same more or less" after the statement of quantity. Those words had been inserted in the draft contract sent by the defendants' agent to the plaintiff's agent, but the plaintiff's agent en-

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grossed the contract omitting them, and returned the engrossment to the defendants' agent, accompanied by a letter stating that he had made some alterations of no material consequence, and the contract was executed by the defendants' agent without his noticing that the qualifying words had been omitted.

In *Winch v. Winchester*, the property was described as containing "by estimation 41 acres, be the same more or less." It contained only between 35 and 36 acres, and the Master of the Rolls, Sir William Grant, said, pp. 376-7: "First, the effect of the words 'more or less,' added to the statement of quantity, has never been yet absolutely fixed by decision; *Hill v. Buckley* . . . being considered, sometimes as extending to cover only a small difference, the one way, or the other; sometimes, as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance the description is rendered still more loose by the addition of the words 'by estimation.' The estimated extent of ground frequently proves quite different from its contents by actual measurement. It cannot be contended, that the terms 'estimated' and 'measured' have the same meaning. If a man were told, that a piece of land was never measured, but is estimated to contain 41 acres, would that representation be falsified by shewing, that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much." And he decided that the purchaser was not "entitled to an abatement out of the purchase-money for the deficiency of quantity."

In *Portman v. Mill*, the contract described a farm as containing 349 acres or thereabouts, "be the same more or less," and stipulated that the premises should be taken at that quantity, whether more or less. The farm in fact consisted of only 349 customary acres, which was less than the same number of statute acres by 100 acres or upwards, and it was said by Lord Eldon that he could never agree that such a clause as the contract contained would cover so large a deficiency in the number of acres as was alleged to exist.

In *Townshend v. Stangroom*, the defendant was tenant to the plaintiff and in the occupation of a farm which contained 446

acres, 3 roods, and 23 perches, and Mrs. Garrett was tenant to the plaintiff of an adjoining farm. Before the expiry of the defendant's lease the plaintiff arranged with Mrs. Garrett that she should give up about two acres of her holding and should become tenant to the plaintiff of about 24 acres of the farm under lease to the defendant. This was known to the defendant when the agreement in question in the suit was entered into. The contract was entitled "A statement of the quantity of land and annual value of the farm belonging to the Marquis Townshend . . . in the occupation of Christopher Stangroom, as proposed to be let upon a lease . . .;" and the agreement stated the arable and pasture particularly by acres, roods, and perches; in all 425 acres, 1 rood, and 26 perches, "be the same more or less." A bill was filed by the Marquis for the specific performance of the agreement, claiming that the defendant was entitled to a lease of only the 425 acres, 1 rood, and 26 perches, and the defendant filed a cross-bill for the specific performance of the agreement as an agreement for the lease to him of the whole of the land of which he was in occupation. Both bills were dismissed, the plaintiff's on the ground that the Court ought not to "execute an agreement so different from that Stangroom had signed," and the making of which was positively denied by him, and the cross-bill on the ground that the plaintiff ought not to be compelled to execute an agreement into which he had not intended to enter. In the course of his judgment, Lord Eldon, dealing apparently with the argument of Stangroom's counsel that the farm in his occupation was intended to be let, and that the words "be the same more or less" shewed that the parties meant to be bound by the description of the person (?), not of the quantity of land, said: "As to the expression 'more or less,' I do not say, those words in a contract will not include a few additional acres; but if the parties are contending about three acres, it would be very singular upon those words to add twenty-four map acres; which he knew were already demised, as far as parol could demise them, to Mrs. Garrett. It is almost impossible that he could mean to include them."

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To those cases may be added the Irish case of *Connor v. Potts*,

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[1897] 1 I.R. 534, in which the facts were that the plaintiff had agreed to purchase land for £5,500 on the representation by the defendant that it contained 443 acres, the price being roughly arrived at by multiplying £12 10 0 by that number; that the area was less by 67 acres; but the representation was made in the belief that it was true; and it was held by Vice-Chancellor Chatterton that the plaintiff was entitled to specific performance as to the real acreage, with a deduction from the purchase-money in respect of the deficiency of £12 10 0 per acre. This case does not bear directly on the question I am considering, and I refer to it only because of the statement of the Vice-Chancellor that "the general principle applicable to this case is well established, that where a misrepresentation is made by a vendor as to a matter within his knowledge, even though it may be founded upon an honest belief in the truth of what he states, and the purchaser has been misled by such misrepresentation, the purchaser is entitled to have the contract specifically performed so far as the vendor is able to do so, and to have compensation for the deficiency."

An analysis of the English cases, I think, fully justifies the statement of Mr. Justice Gray that it is difficult to extract from them any consistent principle.

It would, I think, be a novel and startling thing to hold that in this Province, where the lands have been surveyed into lots to which numbers have been given, and the area and dimensions of which are shewn on the maps of the Crown Lands Department, or on the plans in the registry offices, on a contract for the sale of such a lot by its number, the statement in the description of it that it contained by admeasurement a stated number of acres or of square feet 'be the same more or less' would come within the general principle mentioned by Vice-Chancellor Chatterton and would entitle the purchaser to compensation for any deficiency in quantity, if in fact the lot did not contain as many acres or as many square feet as it was said to contain, and there is nothing in any of the decided cases which requires me to hold that that general principle is applicable to such a case.

In the earlier patents from the Crown it was usual to add to the description by number of the lot granted a statement that it

contained by admeasurement a stated number of acres more or less, and in numberless conveyances and contracts of sale lots have been similarly described, and, so far as I am aware, it has never been supposed that the statement as to quantity amounted to a representation entitling the purchaser, in the case of a contract of sale, to compensation for any deficiency, if the lot contained less land than the stated quantity.

Similarly, I should be of opinion that where, in addition to the description of such a lot, there was added a statement as to the length of its boundary lines, qualified by the words "more or less," the seller would not be bound to make compensation if these lines were not of the stated length.

In saying this, I must not be understood as including a case where the sale is by the acre or by the foot, or where the contract is based upon the supposition that the lot contains the stated area or has the stated frontage or depth, and the fact that it has not is known to the vendor.

I entirely agree in the reasoning of Mr. Justice Gray and in the law as laid down in *Noble v. Googins*.

I refer also to *Mann and Toles v. Pearson* (1806), 2 Johns. (N.Y.) 37, in which a bond for the conveyance of "lot No. 78 in the township of Lysander, containing 600 acres," was held by the Supreme Court of New York to be fully complied with by giving a deed of the same lot, describing it as "containing 600 acres of land be the same more or less," although it was found by actual survey to contain less than 422 acres. It will be noticed that there were no such qualifying words as "it is said" or "more or less" or "thereabouts;" and, had the bond contained a particular description of the estate by metes and bounds, or such qualifying words, two of the Judges who dissented expressed the opinion that the statement of quantity would have been controlled by them.

In *Weart v. Rose* (1863), 16 N.J. Eq. 290, the claim for compensation arose after conveyance; but I refer to it because the judgment contains a very full discussion of the principles applicable, generally, between vendor and purchaser.

In the case at bar, though the lot is not described by its number, it is by the house number.

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It is, as I have said, bounded on two sides by streets and in the rear by a lane, so that on three sides its limits were apparent to even a casual observer, and in my opinion, in accordance with the principle upon which *Noble v. Googins* was decided, the words, "more or less," added to the statement of the depth, control that statement, so that neither party would "be entitled to relief on account of a deficiency or surplus unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract," and upon the facts of this case no such presumption is raised.

The plaintiffs are not, in my opinion, entitled to compensation, but, if they choose to take what the defendant owns, they may have judgment for specific performance without costs; and, in the event of their not electing within ten days to take such a judgment, the action will be dismissed with costs.

[Affirmed by a Divisional Court on the 17th February, 1911.]

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Contract—Advertisement—Company—Redemption of Bonds—Specific Performance—Mortgage Trust Deed—Construction—Breach of Trust—Relief under 62 Vict. (2) ch. 15, sec. 1 (O.)—Damages.

Held, reversing the judgment of RIDDELL, J., 19 O.L.R. 605, GARROW and MEREDITH, J.J.A., dissenting, that, upon the proper construction of the mortgage trust deed under which the defendants were trustees, they had not, in regard to the acceptance and retirement of bonds offered for redemption, followed the directions of the instrument, and were guilty of a breach of trust, from the consequences of which, though they acted in good faith, they were not relieved by the provisions of the instrument nor by sec. 1 of the Trustee Act, 62 Vict. (2) ch. 15 (O.) The defendants were, therefore, liable to the plaintiff in damages; and the assessment of damages by the trial Judge at \$700 should be adopted.

Per Moss, C.J.O.—The whole scope of the instrument was in favour of equality and against discrimination. The obvious intention was to place all holders of bonds, whether large or small in number, upon an equal footing, and to treat all alike. What was actually done was to put upon one side everything that had been done and properly done, under the directions of sub-sec. 1 of sec. 12 of art. 2 of the instrument, and to enter into a new transaction for the retirement of the bonds by a process not provided for and not contemplated by the instrument.—In order to avail himself of the benefit of sec. 1 of the Trustee Act, it is incumbent upon a trustee to make it appear to the Court, not only that he has acted honestly, but that he has acted reasonably, and ought

fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter. The defendants had no intention to act otherwise than honestly; but it could not be said that they had acted reasonably; and they had not shewn any fair excuse for the breach of trust, nor any reason why the plaintiff, who had committed no fault, should lose his money to relieve the defendants.

National Trustees Co. of Australasia v. General Finance Co. of Australasia, [1905] A.C. 373, at p. 381, and *Davis v. Hutchings*, [1907] 1 Ch. 356, specially referred to.

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AN appeal by the plaintiff from the judgment of RIDDELL, J., 19 O.L.R. 605, dismissing the action, which was brought for damages for breach of trust or for specific performance of an alleged contract, or damages in lieu thereof.

April 20 and 21. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

C. A. Moss, for the plaintiff. The action of the defendants in failing to purchase the bonds held by the plaintiff at the price offered by him, and subsequently purchasing other bonds at a higher price, constituted a breach of trust towards the plaintiff, who was entitled to the damages which he suffered by reason of the breach. The defendants are not entitled to rely on the provisions of 62 Vict. (2) ch. 15, sec. 1 (O.), which has never been applied to a case of this sort. They are not trustees in the ordinary sense, but carry on the business of executing trusts for remuneration, and they are bound to take reasonable care in interpreting the trust deed under which they act. In this case their general manager acted without consulting his solicitors, or the board of directors, and, if he made a mistake, the defendants are not thereby excused: *Chapman v. Browne*, [1902] 1 Ch. 785, *per* Romer, L.J., at p. 805. The defendants are also liable to the plaintiff on the ground that by reason of their advertisement, which came to the notice of the plaintiff, and his acceptance of its terms, a contract was constituted between the parties, which the defendants have refused to carry out: *Carlill v. Carbolie Smoke Ball Co.*, [1893] 1 Q.B. 256; *Williams v. Carwardine* (1833), 4 B. & Ad. 621; *Gibbons v. Proctor* (1891), 64 L.T.N.S. 594. In *Rooke v. Dawson*, [1895] 1 Ch. 480, the trust deed was not referred to in the advertisement, as it is in this case. The plaintiff cannot be charged with

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laches, as he acted promptly after coming to a knowledge of his rights. The sum awarded by the trial Judge for damages, in case the plaintiff should succeed in the appeal, is inadequate, as the evidence shews that there was no market for the bonds.

A. W. Anglin, K.C., and R. C. H. Cassels, for the defendants. The defendants correctly interpreted the provisions of the trust mortgage regarding the sinking fund; "the lowest price" meant the lowest price for the whole sum available. The trusts and remedies declared and provided by the trust deed in connection with the redemption of bonds were not for the individual bondholder, but for the body of bondholders as such. "Price" under these provisions is not "rate" merely, but involves quantity as well as rate, as appears from the advertisement. The tenderer of bonds is not necessarily a bondholder, and, therefore, not necessarily a *cestui que trust*—he may simply be one who controls or expects to control bonds. The intent of provisions as to tenders is to create a contract, not a trust, and here there was no such *consensus* between the parties as would be necessary in order to constitute a contract. *Rooke v. Dawson*, *supra*, cited in the judgment, though not on all fours with the case at bar, is similar to it; but the case most in point as to the liability of parties calling for tenders is *Spencer v. Harding* (1870), L.R. 5 C.P. 561. On the question of damages, the *onus* lay on the plaintiff to establish damage, which he has failed to do, and the learned trial Judge erred in fixing the amount as high as \$700, as there was no evidence that the offer to purchase at 75 cents was accepted. The defendants also relied on the statute 62 Vict. (2) ch. 15, and on the finding and reasons for judgment of the trial Judge.

Moss, in reply.

December 19. Moss, C.J.O.:—The essential portions of the trust instrument upon the terms of which the plaintiff claims relief in this action are set forth in the judgment of the learned trial Judge.

The purpose and object with which it was given by the Dominion Copper Company Limited, to the defendants, was to set forth to persons who might be desirous of investing in the

purchase of first mortgage six per cent. gold bonds, of which the Dominion Copper Company was proposing to make an issue, the security, terms and conditions upon which their holdings would be based, and thereby induce favourable consideration of the proposal.

The bonds were to be dated the 1st June, 1905, and be payable in gold or its equivalent on the 1st June, 1915, with interest in the meantime at the rate of six per cent., payable semi-annually in each year until the payment of the principal. Proposing investors were assured that not only were all the assets and property of the Dominion Copper Company pledged for payment of the principal and interest in respect of such bonds as they might acquire, and for that purpose were vested in the defendants, but that a method was provided whereby, at certain periods during the currency of such bonds, an opportunity was afforded them of anticipating the time fixed for repayment of the principal moneys.

The provision in question is contained in sec. 12 of art. 2, which is set forth verbatim in the judgment of the learned trial Judge. Briefly, its effect is that the Dominion Copper Company is, at specified times between the date of the investment and the 1st June, 1914, to pay to the defendants all its surplus profits, less certain deductions, and the moneys so paid "shall be applied to the *retirement* of bonds of the company issued hereunder and secured hereby, and *for that purpose only* as follows." And then follow the two sub-sections of sec. 12, which are the occasion of the chief controversy in this action. There has been much argument as to the meaning and effect of these sub-sections, and especially as to the meaning of the words "and from the bonds offered to it shall purchase those bonds which are offered to it at the lowest price, not however exceeding the par value of such bonds . . ." which occur in the first; and the words "If during the prescribed period sufficient (the "if" preceding "sufficient" is omitted as unnecessary if not redundant) bonds are not offered to exhaust said fund at less than par then and in that event said trustee shall . . . give notice that certain bonds, specifying the same by number to be drawn by lot . . . are called for the purpose of invest-

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ing therein the moneys paid to the trustee . . .” which occur in the second.

It is possible upon this language to suggest various supposed contingencies in which it might seem to appear that payment to a bondholder for his bonds of a rate exceeding that offered by another bondholder for his bonds might be deemed a “purchase at the lowest price.” But this language of the instrument was intended for the information and guidance of people of plain, ordinary business understanding, who were to read it in connection with its other provisions; and the meaning which it was intended to convey to persons considering it with a view to investing in the bonds ought reasonably to be that which should be given to it.

It would, I think, be a surprise to a great number of people to be told that the taking over of bonds at nearly 87 per cent. of the par value, when other bonds were offered at 82 per cent., was a purchase at the lowest price.

It is to be observed that the funds in the defendants’ hands were to be applied to the retirement of bonds and for that purpose only; and, although the word “purchase” is used, it is manifest that it was intended to inform proposing purchasers of the bonds that those of them who desired to offer their bonds, under sub-sec. 1, would be entitled to have them retired in the order in which the prices they put on them entitled them to be placed, that is, that if, relatively to the price named by other holders, their bonds stood lower in price, they would be taken up. Thus all that were offered at the very lowest figure would be taken up first, then all offered at the next lowest figure, and so on until the fund or the number of bonds offered was exhausted, whichever first happened. I cannot help thinking that this is the correct meaning of the provision and that such was the intention of its framers. This was the construction first placed upon it by the vice-president and general manager of the defendants, and apparently acquiesced in by Mr. Untermeyer, one of the general counsel of the Dominion Copper Company. It is said, however, that the fact that the number of bonds offered by Mr. Untermeyer at nearly 87 per cent. of par, added to the number of those offered at lower figures, brought up the whole quantity

of bonds offered to an amount beyond the sum in the defendants' hands, and that Mr. Untermeyer was not inclined to or obliged to reduce the number offered by him, justified a different construction. The reason given is that the result was that the contingency spoken of in sub-sec. 2 did not occur. But, if Mr. Untermeyer was not prepared to accept the retirement of such a number of his bonds as would exhaust the remainder of the fund left after retirement of the bonds offered at a lower price than his, then he had not made an offer that the defendants could deal with at all, and he was not to be treated as having made an offer within the meaning of the two sub-sections. There is nothing in them to inform proposing purchasers of bonds that their offer to retire their bonds was subject to be cut out by an offer at a higher figure by some larger holder. On the contrary, the whole scope of the instrument is in favour of equality, and against discrimination. The obvious intention is to place all holders of bonds, whether large or small in number, upon an equal footing, and to treat all alike. What was actually done was to put upon one side everything that had been done and properly done under the directions of sub-sec. 1, and to enter into a new transaction for the retirement of the bonds by a process not provided for and not contemplated by the instrument.

The defendants undoubtedly acted in good faith, but, in my opinion, they did not comply with or follow the plain directions of the trust instrument, with the result that the plaintiff was deprived of a position that the defendants should have recognised.

And I am unable to agree with the learned Judge that either the provisions of the trust instrument or the Trustee Act, 62 Vict. (2) ch. 15, sec. 1, shield them from the consequences of their default.

It is plain that sec. 13 of art. 4 of the instrument upon which the defendants rely is designed for the protection of the Dominion Copper Company from actions by bondholders, and is not intended for or directed to the protection of the defendants from proceedings against them of the nature of the present action.

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Nor do I think that the provisions of sec. 1 of the Trustee Act ought to be given effect to in order to protect the defendants from the enforcement of a remedy for default such as that of which the plaintiff complains.

In order to avail himself of the benefit of these provisions, it is incumbent upon a trustee to make it appear to the Court, not only that he has acted honestly, but that he has acted reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter. Here the defendants had no intention to act otherwise than honestly; but can it be said that their action in deciding to deal with and in effect make a bargain not contemplated by the terms of the trust instrument, giving to one of the bondholders a position and status different from that to which he was entitled upon his first offer, and seriously affecting the position of the other bondholders who had offered their bonds, without consultation or communication with them, and without taking any other step to ascertain their duty in the circumstances, was reasonable? They were alive to the doubts and difficulties of the position, and seem to have decided to take upon themselves the risk of acting without reference to the other interested parties.

But, as pointed out by their Lordships of the Privy Council in *National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A.C. 373, at p. 381, it is not sufficient to entitle trustees to relief under the Act to establish that they acted honestly and reasonably. They must go further and satisfy the Court that under all the circumstances they ought fairly to be excused. The position of the defendants in the case at bar is not dissimilar to that of the appellants in that case. And it may be said of the defendants here, as was said in that case, that, without saying that the remedial provisions of the section should never be applied to a trustee in the position of the defendants, it is a circumstance to be taken into account, and there is not shewn any fair excuse for the breach of trust nor any reason why the plaintiff, who has committed no fault, should lose his money to relieve the defendants: see also *Davis v. Hutchings*, [1907] 1 Ch. 356.

Whether the plaintiff's action be based on failure to observe the trust, or rests on quasi-contract, there is no reason why he should not recover such damage as he may have fairly sustained, nor why the same measure should not apply.

The quantum of the damage has been ascertained by the learned trial Judge, upon evidence adduced by both parties, and his finding thereon, as a question of fact, should not be disturbed, but should stand as the amount of the plaintiff's loss which he should recover from the defendants.

The appeal should, therefore, be allowed, and judgment entered for the plaintiff for \$700, with costs here and below.

GARROW, J.A.:—Appeal by the plaintiff from the judgment at the trial of Riddell, J., who dismissed the action with costs.

The action was brought to compel performance of an alleged agreement for the sale of certain bonds of the Dominion Copper Company Limited, by the plaintiff to the defendants, or, in the alternative, for damages for non-performance.

The facts are set out in the judgment below and are not really in dispute.

Riddell, J., held: (1) that the defendants had acted properly in the circumstances; (2) that, if a breach of trust was committed, the defendants were probably entitled to be relieved under the express terms of the trust mortgage, and, in any event, were entitled to be relieved under the provisions of 62 Vict. (2) ch. 15, sec. 1; and (3) the plaintiff had failed to establish a contract apart from the trust mortgage.

The bonds upon their face are called "first mortgage six per cent. gold bond," and in express terms thus refer to the trust mortgage, "to which indenture reference is hereby made for a statement of the property pledged and mortgaged, the nature and extent of the security, and *the terms and conditions upon which said bonds are issued, received, and held.*"

The circular or advertisement stated that "in accord with the requirements of its mortgage . . . securing the above issue, the mortgagor has paid out of its savings the sum of one hundred and seventy thousand dollars to the National Trust Company Limited, trustee under the mortgage, to be applied in the re-

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demption of bonds as provided by the mortgage." The total issue of bonds authorised and issued was \$1,000,000. The sum at the disposal of the defendants was only \$170,000. The tenders received ran from 75 up to over par—105 was, I think, the highest. In each tender the number of bonds offered, as well as the price, was given. The largest tender in point of number was that of Samuel Untermeyer, namely, for a par value of \$195,700, which he offered at a rate of about 87. And the plaintiff's main complaint is that this offer was accepted, while the plaintiff's offer to sell \$10,000 par value at 82 was not.

The result was to obtain, for the \$170,000, bonds of the par value of \$200,000, or at a rate of 85. And the defendants' contention is that in no other way could the whole fund have been invested to achieve such a favourable result. With that result Riddell, J., agreed.

The total offerings below par, exclusive of the Untermeyer offer, amounted to \$167,600 par value. And had these, which would have of course included the offer of the plaintiff, been accepted instead, the sum of about \$30,000, balance of the \$170,000, would have remained. The offerings over par only amounted to \$11,400, so that, even if these had also been accepted, there would still have remained a considerable balance unemployed. The defendants assumed, not unreasonably, that the Untermeyer offer had either to be accepted as made or rejected. It afterwards appeared that Mr. Untermeyer would have been willing to accept the rate and to have reduced the number, but this was not known to the defendants when the Untermeyer offer was accepted.

My first impression was, as the plaintiff's counsel argued, that the defendants had no alternative but to accept all the lowest tenders, no matter what the consequences might be, and, if a balance was left over, to proceed under the other provisions of the mortgage.

This, however, on reflection, seems to me too narrow a view. The defendants were trustees not so much for the individual bondholder as for the whole body of bondholders. The main duty was owing to them. And it was certainly to their advantage to have the largest number of bonds possible paid off by

means of the \$170,000 in hand, for by so much would the security for the remainder be increased. It may be that as favourable a result might have been obtained in the method contended for by the plaintiff, but there is at least an even chance that it would have been otherwise, and upon the whole I think the defendants exercised a wise discretion in taking the course which they did. The action, therefore, in so far as it proceeds upon the alleged breach of trust, fails.

This renders it, I think, unnecessary to pronounce any opinion upon the claim to indemnity under the statute, or under the terms of the mortgage.

Upon the other branch, there is, in my opinion, no good reason upon which the plaintiff's contention that there was, apart from the trust mortgage altogether, a valid contract created by the so-called offer and acceptance, can rest. The bonds on their face refer to the mortgage. So does the circular or advertisement calling for tenders. And the defendants were clearly proceeding under it, as it must be taken that the plaintiff, who is a gentleman of experience in such matters, knew. He had been interested in the mortgagor company for a very long time; was indeed one of the original bondholders. He could not, under the circumstances, have regarded it as the case of an ordinary open offer to buy bonds, which could be consummated by an offer to sell. It was in fact a special offer, on its face based upon the mortgage, the terms of which were thereby, in my opinion, incorporated, to expend the \$170,000 in redeeming bonds to that amount upon the terms contained in the mortgage.

In my opinion, the appeal fails and should be dismissed with costs.

MACLAREN, J.A.:—The first question that arises in this case is the proper interpretation of a few words, in a very long mortgage deed bearing date the 1st June, 1905, whereby the Dominion Copper Company, a British Columbia mining corporation, mortgaged certain mining stocks, mineral claims, mines, etc., to the National Trust Company, as trustees for the holders of bonds to the amount of \$1,000,000 to be issued by the mortgagor

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company. The latter company was to pay to the trustees annually, out of its surplus profits, the sum of \$100,000, with which the trustees were to purchase bonds of the company, and, if the full sum were not paid in any year, the deficiency might be made up the following year.

The clause of the deed governing the acquisition and retirement of these bonds is found in sec. 12 of art. 2, and reads as follows: "The moneys so paid to the trustee shall be applied to the retirement of bonds of the company issued hereunder and secured hereby, and for that purpose only, to be obtained as follows: (1) During the period extending from the 1st day of June, 1906, to the 1st day of June, 1914, both inclusive, the trustee shall annually or oftener, at such times as it shall deem advisable in the exercise of an absolute discretion, by a notice published once a week for two consecutive weeks in a newspaper in general circulation in the city of New York, and in a newspaper in general circulation in the city of Toronto, call for offerings of the bonds issued under and secured hereby to be made within some period prescribed in the said notice, and from the bonds offered to it shall purchase those bonds which are offered to it at the lowest price, not however exceeding the par value of said bonds and the then accrued interest for each such bond. (2) If during the prescribed period, if sufficient bonds are not offered to exhaust said fund at less than par, then and in that event said trustee shall, by a notice published once a week for two consecutive weeks in a newspaper of general circulation published in the city of New York and in a newspaper of general circulation in the city of Toronto, give notice that certain bonds, specifying the same by their numbers to be drawn by lot as below mentioned, are called for the purpose of investing therein the moneys paid to the trustee by the mortgagor company."

By the fifth article of the deed the company was to have the right, on the 1st day of June or December in any year prior to the maturity of the bonds, to pay off all or any of them at par, with accrued interest.

On the 26th April, 1907, the company passed a resolution to pay to the trustees the sum of \$170,000 out of the company's

surplus profits for the preceding two years for the retirement of bonds as provided by sec. 12 above quoted; and the money was paid over a few days later.

The trustees thereupon advertised for bonds below par, and up to the 25th May, 1907, the time fixed, they had received offers of bonds whose par value aggregated \$363,300 for payments in all amounting to \$309,785.70, at rates ranging from 75 to 99½ per cent. Among these was an offer from the present plaintiff of bonds of the par value of \$10,000 at 82 per cent. and one from Samuel Untermeyer of bonds of the par value of \$195,700 for the sum of \$170,000, which would equal 86.8 per cent. Apart from Untermeyer's, there were tenders of \$163,600 bonds for \$139,785.70, which would leave a balance of \$30,214.30 of the \$170,000 unused. The manager of the trustee company, defendants, was at first under the impression that he could acquire the bonds other than Untermeyer's that were offered below par, and use the balance of the \$170,000 in acquiring at par bonds under the second part of sec. 12 above quoted, but he came subsequently to the conclusion that he had not this power. He then endeavoured to get Untermeyer to agree to his accepting all the tenders that were lower than his, and that he should furnish the remaining bonds necessary to exhaust the \$170,000 at the same rate as he had offered the larger amount. Untermeyer was willing to do this, but the manager, before he had received Untermeyer's favourable answer, was afraid that Untermeyer's offer might be wholly withdrawn, and accepted in its entirety the offer as it was originally made. It was finally agreed between them that all bonds tendered under 80 should be acquired by the trustees. These amounted to \$39,400, and were purchased for \$30,937.75; and Untermeyer furnished \$160,600 bonds for \$139,062.25, the balance of the \$170,000.

The plaintiff complains that under the deed the trustees had not the right to accept Untermeyer's bonds at 86.8 and reject his at 82; that this was not a purchase "at the lowest price." The defendants contend that as trustees they had a right to refuse the plaintiff's tender or offer, and that by the method adopted a better result was obtained for the bondholders as a body, as \$200,000 of bonds were acquired with the \$170,000 and

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cancelled, and only \$198,000 would have been acquired if all the other tenders below par had been accepted, and the balance had been spent in purchasing at par.

I am of opinion that under a proper construction of the deed it was the duty of the trustees to accept the tender of the plaintiff, inasmuch as it was lower than that of Untermeyer, and that the trustees did not comply with the terms of the deed which required them to "purchase those bonds which are offered to it at the lowest price." If under this deed a large holder should, as here, tender for the whole amount or for an amount which with those offered at a lower price would more than exhaust the whole sum available, I do not think the trustees would have the right to reject the lower small tenders and accept the higher large tenders. I can find nothing in the deed to justify our not taking the words directing the trustee to "purchase those bonds which are offered to it at the lowest price" at their plain, literal meaning—a meaning put upon them by the large tenderer himself in his letter discussing the situation, and he is said to be the legal adviser of the mortgagor company—and to put upon them what seems to me to be a forced construction.

But it is contended on behalf of the trustees that, even if a technical breach of trust were committed, relief should be granted under the statute 62 Vict. (2) ch. 15 (O.) It is to be observed that it is not every breach of trust where the trustee has acted honestly and even reasonably that he is to be relieved against, and I do not think the statute was intended to cover a case like the present. To so decide would, I think, go much further than is done in any of the cases cited in the judgment appealed from or mentioned by the counsel for the respondents.

I am of opinion that the appeal should be allowed.

MEREDITH, J.A.:—Even if his tender were "at the lowest price," I am not prepared to give assent to the claim of the plaintiff that he has a cause of action against the defendants—that there was a contract between him and them, or that there was a trust enforceable by him against them; but, as the plaintiff fails upon the merits of his claims, as I find, it is not necessary for me to consider any such questions.

It is manifest that the plaintiff has no claim of any kind unless his offer was "at lowest price," within the meaning of those words as used in the deed in question. I would also have thought it manifest that the plaintiff's offer was not, literally, or in any other sense, "at the lowest price." There were offers below it, and above it, so that it was, in truth, an offer at an intermediate price.

That which the words in question mean seems to me to be very plain. The deed provides for the making of the most of the sum available for the redemption of bonds; that was the manifest object of the trust in this respect; and therefore offerings at the lowest price must have meant such offers as would redeem the most bonds for the whole sum available. What else could intelligent business men have meant? If the plaintiff's offer had been for the whole sum in bonds at 82 cents in the dollar, his offer would have been at the lowest price, even though there were other tenders for small amounts at a lower rate; but, if his offer had been for the whole amount, *or any part of it*, at 82 cents, then the lower offers would have come in, because excluding them would not redeem the most for the sum available.

Untermeyer's offer was not divisible, and so did not let in the lower tenderers for comparatively small amounts. Untermeyer's offer was for the whole sum, and so was at the lowest price within the meaning of the deed. Whether Untermeyer was or was not afterwards willing to change his offer to one for any part of the \$170,000, can make no difference, for, when the transaction was closed, it was an indivisible offer at the lowest price, in so far as the plaintiff was concerned. If the defendants were guilty of any error in closing with Untermeyer without awaiting the result of an effort to have the offer made divisible, they are not answerable to the plaintiff for that, to whomsoever else, if any one, they may be liable; the plaintiff has a cause of action—if at all—only if his offer were "at the lowest price;" which it never was.

Test it in the simplest way possible—suppose that the plaintiff's offer, and the offers of others at lower rates in the dollar, had been accepted, and Untermeyer had refused to vary

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his offer, where would the trustees have been? If the plaintiff's contention is to be given effect to, then he could have prevented any sale if his offer, even for the pettiest amount, were even a shade lower than offers for the whole amount, unless the other tenderers could be induced to make their indivisible offers divisible.

I cannot but think the learned Judge was right in dismissing the action, and that this appeal should be likewise dealt with.

MAGEE, J.A. :—The plaintiff held ten “bonds” of the Dominion Copper Company Limited, for \$1,000 each. He had acquired them direct from the company on a scheme of reorganisation of another company, but whether at a discount or premium or not does not appear. They were dated the 1st June, 1905, and bore interest at six per cent. per annum, on half-yearly coupons. They were part of a series amounting to \$1,000,000, all of which had been issued before the 1st April, 1907. By each bond the Dominion Copper Company agreed to pay to the bearer (or, if registered, the registered owner) the principal sum therein on the 1st June, 1915, “or sooner through the operation of the sinking fund provided by the mortgage” of the same date from that company to the National Trust Company as trustees. In each bond it was declared that it was one of the series, and that the payment of the principal and interest of all the bonds was equally and ratably secured by the mortgage, pledging and mortgaging to the trustees certain stocks, mines, and other properties as set forth in the mortgage, “to which reference is hereby made for a statement of the property pledged and mortgaged, the nature and extent of the security, and the terms and conditions upon which the said bonds are issued, received, and held,” and that, if default should be made in the payment of interest for thirty days after demand, or in performance of any covenant in the mortgage for an unreasonable time, the principal money might become immediately due and payable as provided for in the mortgage, and that the bonds might be redeemed at par and accrued interest at any coupon maturity date at the option of the Dominion Copper Company exercised as provided in the mortgage.

The mortgage, also dated the 1st June, 1905, was made only between the Dominion Copper Company as the mortgagor company, and the defendants, the National Trust Company, thereafter referred to as the trustee. It recited the resolution to issue bonds to be secured by the mortgage, and then, in consideration of the premiums and \$1, and in order to secure the payment of the principal and interest, "as the same shall become payable according to the tenor of the said bonds and the coupons," and in order to insure the faithful performance of the covenants and agreements thereafter set forth, and "in order to declare the terms and conditions upon which said bonds are issued, received and to be held," the mortgagor company thereby granted and assigned the various mortgaged premises to the defendant company as trustees, "but in trust nevertheless for the equal *pro ratâ* use, benefit, and security of all" the holders of the bonds and coupons, without preference, priority, or distinction. It was thereby further agreed between the parties thereto "that all such bonds are to be issued, negotiated, received, and held," and the properties mortgaged were to be held by the trustee, "upon and subject to the following further trusts, uses, conditions, and covenants." Then followed various articles divided into sections. By art. 2, the mortgagor company covenanted (sec. 1) that it would duly and punctually pay the principal and interest of every bond . . . "according to the terms thereof;" and by sec. 12, the mortgagor company agreed that it would on the 1st June, 1906 and 1907, pay to the trustee all its surplus profits for such years after all payments and reservations for betterments, improvements, and extensions had been deducted up to but not exceeding ten per cent. of the aggregate amount of bonds outstanding on the previous 1st April, and on the 1st June, 1908, and each year thereafter would pay the trustee an amount equal to ten per cent. of such aggregate, nothing therein to prevent such payment being made before the 1st June in any year; and the money so paid to the trustee should be applied "to the retirement of bonds," "and for that purpose only, to be obtained as follows . . . the trustee shall annually or oftener at such times as it shall deem advisable in the exercise of an absolute discretion, by a notice published . . . call for offerings of

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the bonds . . . to be made within some period prescribed in said notice, and from the bonds offered to it shall purchase those bonds which are offered to it at the lowest price, not, however, exceeding the par value . . . If during the prescribed period sufficient bonds are not offered to exhaust said fund at less than par, then and in that event said trustee shall, by a notice published, . . . give notice that certain bonds, specifying the same by their numbers, to be drawn by lot as below-mentioned, are called for the purpose of investing therein the moneys paid to the trustee by the mortgagor company . . . such bonds so to be called to be chosen by lot by the trustee. The bonds having been so called shall become due and payable . . . upon a date specified in the call . . . at par of said bonds and the interest then accrued thereon . . . The bonds which shall be acquired . . . shall as soon as received by the trustee be cancelled."

Article 5 gives the mortgagor company the right, on the 1st June and December in any year, to redeem and pay off all or any of the outstanding bonds at par with the then accrued interest, all bonds redeemed to be chosen by lot by the trustee on receipt of a copy of the directors' resolution setting forth the amount to be redeemed.

In the fourth article (sec. 1), in case of default in payment of bonds, it was made the duty of the trustee, upon written request of the holders of a majority in amount of the bonds, to sell to the highest bidder the mortgaged property in such lots or parcels as the trustee might fix.

It will be seen from these provisions that while, on the one hand, the Dominion Copper Company was bound to pay some of its bonds in advance every year, on the other hand it reserved the right to pay all or any of them. So that, not knowing at what price the bonds were issued, we cannot from the documents themselves discover whether payment in advance was deemed an advantage to the bondholder or not. Bearing, as they did, a good rate of interest, one would be inclined to consider it a disadvantage unless they were issued at a discount, which the suggested possibility of holders being willing to take less than par lends colour to.

On the 26th April, 1907, the directors passed a resolution to

pay to the National Trust Company \$170,000 out of the "surplus profits during the past two years in full compliance with the requirements of sec. 12 of article second of said mortgage . . . to be applied by said trust company to the retirement of bonds . . . in the manner provided in said section 12 . . . the trust company is hereby authorised and directed forthwith to call for offerings of the bonds and to purchase such as it is authorised to purchase under the terms of said sec. 12, and, if sufficient bonds are not offered to exhaust said fund at less than par, then the trust company is authorised to choose by lot and to redeem sufficient of said bonds to exhaust the balance of said fund in the manner prescribed in said mortgage."

Thereupon the National Trust Company published a notice that "the Dominion Copper Company Limited, in accordance with the requirements of its mortgage, . . . has paid out of its earnings the sum of \$170,000 to the National Trust Company, Limited, trustee under the mortgage, to be applied in the redemption of bonds as provided by the mortgage. Offerings of the bonds for sale as of 1st June, 1907, exclusive of the interest coupons maturing on that date . . . will be received up to and inclusive of May 25th, 1907."

In answer to this advertisement and notices sent to bondholders, the company received on and before the 25th May about fifty offers of bonds in varying amounts and rates, at less than par, besides about thirty offers at par or above.

The offers below par may be summarised thus:—

At 75 (the lowest offer)	\$1,000 for	\$ 750.00
76	1,000 "	760.00
77	8,900 "	6,853.00
78 to 79 $\frac{7}{8}$	28,500 "	22,574.75
	\$39,400 for	\$30,937.75
At 80	40,200 "	32,160.00
82 (the plaintiff's offer)	10,000 "	8,200.00
84.70 to 84.95	40,100 "	33,989.95
85	12,300 "	10,455.00
86.8 (Samuel Untermeyer's offer) ..	195,700 "	170,000.00
90 to 99 $\frac{1}{2}$	25,600 "	24,043.00
Total	\$363,300 "	\$309,785.70

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The offers at 75 and 76 were by one person, who also offered \$1,000 at 77, \$1,000 at 78, and \$700 at 80. It does not appear whether any one could have been accepted without the others.

As above mentioned, the plaintiff offered bonds amounting to \$10,000 for \$8,500. One Samuel Untermeyer made a single offer of bonds amounting to \$195,700 for \$170,000. The National Trust Company knew that bonds to the amount of at least \$8,500 had been issued to the plaintiff and a large amount to Untermeyer, but did not know what amount either actually held.

It will be seen that, outside of Untermeyer's offer, those at less than par only amounted to \$167,600 for \$139,785.70, being at an average rate of 83.4 and would be insufficient to exhaust the \$170,000—whereas his offer alone was for exactly that sum. The offers below him amounted to \$142,000 for \$115,742.70.

The 25th May, the last day for receipt of the offers, was Saturday. On going over them on that day, Mr. White, the trust company's vice-president and general manager, considered that the offers at the lowest rates must be accepted as far as the fund would suffice, and consequently all below Untermeyer's offer must be so accepted—and, Untermeyer's offer as it stood not being apportionable, there would not be sufficient left for it; and, if not made apportionable, it would have to be left out of consideration and those above it resorted to. Acting on this view, he telegraphed Untermeyer, "Will you sell any part of amount offered at same rate, or must whole tender be accepted in order to get rate mentioned?" To which Untermeyer, on the same date, replied by telegram, "If you have offers for small amounts on better terms for company, I would entertain selling balance under my proposal. Am anxious to do best possible for company—write full particulars."

On Monday the trust company telegraphed him, "We have tenders for \$142,000 of bonds for \$115,742.70—will you sell \$62,400 of bonds for balance of sinking fund?" That would be at 86.95—\$62,500 at 86.8 would have come within a few dollars of exhausting the \$170,000. On the same day, Monday the 27th May, this message was followed up by another from the trust company to Untermeyer, reading: "Unless you are willing to sell \$62,400 bonds at rate of

your tender, we must reject it and accept tenders received under par, drawing for balance. Would not be justified in receiving new tender. Answer at once." This was followed by a telephone conversation in which the amounts and rates of the other offers were made known to Untermeyer.

On the next day, the 28th May, Untermeyer replied by wire, "Will supply remaining bonds."

Before this was received, however, Mr. White had again considered the wording of the mortgage and come to the conclusion that the trust company would have no right to draw any bonds at par by lot for the deficiency, as there had been offers below par for more than \$170,000, and, as all the other offers could not exhaust the fund, it was his duty to accept Untermeyer's offer, and that the trust company ran a risk in rejecting it, in case more than par should be asked for other bonds. So, on the 28th May, before Untermeyer's last-mentioned reply was received, and in ignorance that Untermeyer was acceding to his suggestion, and in the desire to withdraw from the rejection of his offer, and yet to gain some concession from him for the advantage of the beneficiaries, he telegraphed Untermeyer as follows: "Upon further consideration of tenders and terms of mortgage, think we should accept your original tender. Wire us at once whether you are willing for us to accept \$39,400 from other tenders at about 79 and purchase balance from you so that company gets \$200,000 bonds. Must close matter to-day." Upon receipt of this, Untermeyer by telephone and telegram withdrew his offer to "supply remaining bonds," *i.e.*, \$62,400 at 86.95, and stated he would answer the trust company's last telegram later.

On the next day, Wednesday the 29th May, in a telephone conversation with Mr. White, he consented to the trust company accepting the offers below 80 and thereby acquiring \$39,400 from others for \$30,937.75; and to furnish \$160,600 of bonds for \$139,062.25, the trust company thus getting \$200,000 bonds for \$170,000. This both confirmed by telegram and letter that day, and Mr. White also wrote him another letter of the 29th May, in which he puts his position concisely: "That it was not open to the trustee to select by lot to be drawn at par if there should

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be a sufficient offering under par to exhaust the funds in our hands. We, therefore, decided that we should accept your original offer, which would exhaust the funds in our hands, and was at a rate less than par, although we received several tenders at a more favourable rate, but not sufficient in the aggregate. Then followed the negotiations by telephone resulting in the understanding reached this morning."

This sale by Untermeyer of \$160,600 of bonds for \$139,062.25 would be at the rate of \$86.59, and the company's total acquisition of \$200,000 for \$170,000 would be at the rate of 85. This arrangement was carried out. There were some other telegrams and letters and telephone communications on these four days, but those I have mentioned are all which need be referred to.

The plaintiff, Whicher, was notified of the non-acceptance of his offer by letter dated the 28th May, apparently the day before the final arrangement with Untermeyer. On the 1st June the plaintiff wrote to the defendants asking on what basis the bonds were redeemed, and the defendants wrote to him in reply on the 5th June. In that letter the defendants' manager says: "If, therefore, the party who made the one large offering referred to had insisted upon it, he could have shut out all other bonds than his own from participating in the redemption. He, however, agreed to allow those who had offered bonds at less than 80 to participate with him."

It is apparent from Mr. White's evidence that he throughout conceded it to be his primary duty to the body of bondholders and to the Dominion Copper Company to redeem the largest possible amount of bonds with the money at his disposal. He had that duty in view. But from these letters of the defendants to Untermeyer, and to the plaintiff, we learn that their course was dictated by three considerations: (1) they were bound to accept Untermeyer's offer, whether he modified it in their favour or not; (2) Untermeyer could have shut out all other bonds from the redemption; (3) there was no right to draw bonds by lot for redemption at par for any balance of the fund after acceptance of offers.

A fourth opinion held by Mr. White was that any one could tender, whether they were bondholders or not.

The permission to accept the offers below 80 was, in the eye of the defendants, purely a gratuitous concession on the part of Untermeyer. They take credit for having redeemed a larger amount (\$200,000) of bonds with the fund than if they had accepted all the other offers below par and drawn by lot for the balance at par. That is true, for on the latter plan only \$197,814.30 would have been obtained. But that saving was not owing to the defendants carrying out the trusts as they existed, but to Untermeyer's grace. And if he had adhered strictly to his rights as the defendants viewed them, only \$195,700 would have been redeemed. It is only by accident, as it were, and not through any inherent beneficial consequence of the construction the defendants put upon the trust document, that the fortunate result followed. The propriety of that construction the plaintiff challenges. He does so not as one of the body of bondholders and in the interests of the whole class, but in his individual right as being entitled to have his bonds, which he had offered, paid off both under the trusts of the mortgage and under the defendants' contract through their advertisement.

The first question is, was there a trust which the plaintiff was entitled to have carried out?

The copper company's contract was to pay on the 1st June, 1915, or sooner, through the operation of the sinking fund provided for by the mortgage, to which reference was made for the terms and conditions on which the bonds were issued and received and held. The sinking fund having been provided, the duty of the trustee under the mortgage was from the bonds offered to purchase those bonds which were offered at the lowest price. That was one of the "terms and conditions" on which the plaintiff's bonds were "issued" by the copper company, and "received and held" by the plaintiff. He was not bound to offer, but, unless he or some one else did offer, he was liable to have his bonds drawn by lot and be compelled to give them up and lose subsequent interest. That also was one of the terms and conditions. The obligation upon him in case of such a drawing by lot would be clear. Would not the obligation upon the trustee to pay him if drawn by lot be equally clear, and is it any less so if, instead of his bonds being designated by lot, they

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are designated by an offer in compliance with the other terms of the mortgage? It appears to me not less clear.

But there is still the question whether the bonds were designated for redemption, under the circumstances. The trustee was, annually or oftener, at times deemed advisable in its discretion, to call for offerings of the bonds. The defendant company was, therefore, not restricted to one call. From the bonds offered it was to purchase those which were offered at the lowest price. It is, I think, clear that this does not mean only those which will exhaust the fund at its disposal. If that were so, it might be that \$200,000 bonds would be offered at 80 per cent. and \$171,700 at 99 per cent. and the trustee would, on that basis, be bound to reject the former. Neither can it, I think, be read to mean that it is to accept those offers which, taking into account his right to draw by lot at par, will result in obtaining the largest amount of bonds for the fund in hand. That might have been a wise or proper provision to have made, but it was not so expressed, and we cannot make a new contract. The trustee was to purchase "from the bonds offered" those at the lowest price. That surely means the lowest of those offered, and that they were to be purchased so far as the fund would suffice. If they did not exhaust the fund, the trustee was at liberty to call again for offers, or, if he thought advisable, to draw by lot at par. It may be said that there might be only two offers, one of two bonds at 84 per cent. and the other of 200 at 85 per cent., and it would be unreasonable to require the trustee to reject the larger one because of the smaller, but it would not be more unreasonable than if the smaller offer were of \$200,000 at 80 per cent. Of the bonds offered, those offered at 84 per cent. or 85 per cent. would be those at the lowest price, and should be purchased, as the fund was sufficient. Various cases may be put of offers which might raise difficulties, but, if they have not been provided for, it cannot be helped. The safe course is to adhere to the documents upon which the parties went into the transactions, and to their plain reading. Giving it that plain reading and not twisting it to cover a state of circumstances which has arisen, however well-meaningly brought about, I can only arrive at the conclusion that the trustee should

have exhausted all the offers lower than Untermeyer's before purchasing any from him.

Such being the terms of the contract and of the document creating the trust, the trustee held the funds as trustee, and upon these terms which all parties interested were entitled to have carried out—and as trustee it was the company's duty to have them carried out.

Apart from the terms of the trust itself, I am unable to find that there was any contract by reason of the advertisement or the tenders. They could only be construed as relating to the trust, and, if the trust did not require the acceptance of the lowest tender, then there was no reason to expect it, and no contract to sell on those terms.

Nor does it appear to me that the trustee can ask for relief under the statute for the relief of trustees. The Act was not intended to allow a change of beneficiary or to excuse a trustee from liability if he paid to A. what should be paid to B., with whatever good intentions he may have acted. It would be a dangerous doctrine to enable a well-meaning trustee, simply by the exercise of his honest and reasonable judgment as to the construction of the terms of his trust, to deprive one man of his fortune and hand it to another. If, under the terms of this trust, the plaintiff was entitled to the moneys, they should not have been paid to Untermeyer—and the trustee so wrongly paying them must make good the loss. That loss the trial Judge has assessed, on what appears a reasonable basis, at \$700, and the plaintiff should have judgment for that amount and costs, including costs of appeal.

Appeal allowed; GARROW and MEREDITH, JJ.A., dissenting.

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REX V. HAMILTON.

Criminal Law—Unlawful Taking or Enticement of Child—Criminal Code, sec. 316—Offence Committed by Father—Decree of Foreign Court Awarding Custody to Mother—Validity—Jurisdiction—Domicile—Absence of Fraud or Collusion.

The decree of a foreign Court, having jurisdiction over the parties and subject-matter, awarding the custody of a child of six years old to his mother, is of such validity and effect in Ontario—no fraud or collusion being shewn—as to render the child's father liable, under sec. 316 of the Criminal Code, to conviction for the offence of unlawfully taking or enticing away the child with intent to deprive the parent (mother) of the possession thereof.

The Courts will recognise the validity of a divorce granted by a Court of the country where the parties were legally domiciled at the time when the proceedings were taken, although the decree was founded upon causes which would not be considered sufficient in an English Court.

CASE stated by one of the Junior Judges of the County Court of York, upon an indictment and conviction of the defendant for enticing away his own child, who was in the custody of the mother, as follows:—

“Is the decree of the Superior Court of Marion County, Indiana, awarding the custody of the child in question to the mother, of such validity and effect in Canada as to render the father of the child liable, under sec. 316 of the Criminal Code,* for taking or enticing away the child with intent to deprive the parent (mother) of the possession of such child?”

December 8. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

T. C. Robinette, K.C., for the defendant. The question for the Court is as to the validity of the divorce granted to the defendant's wife, on the grounds of cruelty and desertion by the

*316. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child, unlawfully,—

(a) takes or entices away or detains any child; or,

(b) receives or harbours any such child, knowing it to have been unlawfully taken, enticed away or detained with intent aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child.

Indiana Court in 1907. It is submitted that this Court can consider the evidence given in the suit for divorce, which was of the most flimsy description, and such as, on grounds of natural justice and public policy, should not be allowed to give validity to a decree so obtained. It is also submitted that the defendant and his wife had merely a temporary domicile in Indiana when the divorce was obtained, and that it is necessary in such proceedings to prove the husband's real domicile, as to which nothing is said in the evidence. The following cases and authorities were referred to: *Magurn v. Magurn* (1885), 11 A.R. 178; *Rex v. Woods* (1903), 6 O.L.R. 41; Dicey's Conflict of Laws, 2nd ed., note 13 in Appendix, pp. 797, 798, 799, citing *Scott v. Attorney-General* (1886), 11 P.D. 128, and *Bater v. Bater*, [1906] P. 209; *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *Kaufman v. Gerson*, [1904] 1 K.B. 591; *Wallace v. Attorney-General* (1865), L.R. 1 Ch. 1, 9; *Briggs v. Briggs* (1880), 5 P.D. 163.

[GARROW, J.A., referred to *Armitage v. Attorney-General*, [1906] P. 135.]

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown, argued that the case at bar was completely covered by the *Le Mesurier* case, and that, in view of the distinct finding of the County Court Judge that the parties had, at the time of the divorce, an actual domicile in the State of Indiana, there was no doubt that the divorce was valid and binding. Reference was made to *The King v. Brinkley* (1907), 14 O.L.R. 434, where the cases are collected.

December 19. Moss, C.J.O.:—The sole question for decision here is, whether the decree of the Superior Court of Marion County, in the State of Indiana, one of the United States of America, awarding the custody of Almer Frederick Hamilton, a child six years old, to his mother, Charlotte Hamilton, is of such validity and effect here as to render the defendant, who is the child's father, liable, under sec. 316 of the Criminal Code, to conviction for the offence of taking or enticing away with intent to deprive the parent of the possession of such child.

The validity and effect of the decree in and throughout the

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State of Indiana is not and could not be denied by the defendant. He has so far admitted and acknowledged its validity and effect that, since it was pronounced, he has married another wife, and has applied to and obtained from the Court by which it was granted a modification of its terms with regard to the custody of the child.

There can be no doubt as to the jurisdiction of that Court to grant the decree for the causes assigned in a proper case. And it was the proper forum to determine whether the charges made were sufficiently proved.

The learned Junior Judge of the County Court has found that, at the time of the divorce proceedings, the defendant and his wife had made the State of Indiana their home and had acquired in that State their true, real, and actual domicile, and he has also held that there was no collusion or concert such as in law would render the decree invalid.

Virtually, what the defendant is asking is that the Courts of this Province should undertake to review the proceedings in the Indiana Court, treating the matter as if it were *res integra*.

But, the jurisdiction of the Indiana Court being established, and no fraud or collusion being shewn, it is not the province of our Courts to inquire into the grounds or causes upon or for which a decree of divorce has been granted, or the proofs by which they were established. On the contrary, the doctrine, now apparently well settled, is that the Courts will recognise the validity of a divorce granted by a Court of the country where the parties were legally domiciled at the time when the proceedings were taken—and that although the decree was founded upon causes which would not be considered sufficient in an English Court.

If authority is needed for this proposition, it is to be found in the cases cited and referred to in the case of *The King v. Brinkley*, 14 O.L.R. 434. How far this may be a departure from true principles is interestingly discussed by Sir Francis Piggott in his valuable work on Foreign Judgments and Jurisdiction, Part II. (1908), p. 215 *et seq.*

In my opinion, the question reserved should be answered in the affirmative.

MACLAREN, J.A.:—The accused was convicted in the County Judge's Criminal Court of the County of York, under sec. 316 of the Criminal Code, of having unlawfully enticed away a child of six years of age with intent to deprive the mother of the possession of the child.

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The accused, a Canadian living in the State of Indiana, married a lady in Toronto, and they went to live in Indiana, where the child in question was born. The wife obtained a divorce in the Supreme Court of Marion County, in that State, on the ground of cruelty and desertion, and was awarded the custody of the child in question. She subsequently moved to Toronto with her child. The father applied to the Indiana Court for a modification of the decree as to the custody of the child, and was awarded custody during three months each summer; but the offence was committed in January. It was admitted on behalf of the accused, at the trial and before us, that the Indiana Court had power to grant a divorce on the grounds alleged, and, as incidental thereto, to decide as to the custody of the child, and that such a decree would be valid and binding in that State.

The County Court Judge found as a fact, upon the evidence, that the parties had acquired a true, real, and actual domicile in Indiana, before and at the time of the proceedings in the Supreme Court of that State, and found the accused guilty, but reserved for this Court the question whether the decree of the Indiana Court, awarding the custody of the child in question to the mother, was of such validity and effect in Canada as to render the father liable, under sec. 316 of the Criminal Code.

It was strongly argued before us on behalf of the accused that the order as to the custody of the child was a mere incident of the decree of divorce, that such a decree had no force in Canada, and was contrary to natural justice, and that the order as to such custody would fall with it.

The whole question of the validity and recognition in Canada of a divorce obtained in the United States was very fully considered by this Court in the case of *The King v. Brinkley*, 14 O.L.R. 434. The leading English cases of *Harvey v. Farnie* (1882), 8 App. Cas. 43, *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, *Bater v. Bater*, [1906] P. 209, and *Armitage v. Attorney-Gen-*

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eral, ib. 135, as well as *Magurn v. Magurn*, 11 A.R. 178, and *Rex v. Woods*, 6 O.L.R. 41, in this Court, were there discussed. It was said at p. 443: "It has now for many years been well settled law that it is the Courts of the domicile of the parties that have jurisdiction on the question of divorce, and the Courts in England and this Province have adopted the rule that the Courts of a foreign country, when duly authorised by the laws of that country, have jurisdiction, in the absence of collusion or fraud, to dissolve the marriage of parties domiciled in such foreign country at the commencement of the proceedings for divorce."

These requirements are fully met in the present case. The stated case is based upon a finding that the parties were domiciled in Indiana before and at the time of the commencement of proceedings, and that there was no collusion or fraud.

The question should be answered in the affirmative.

MEREDITH, J.A.:—The one ground urged in the defendant's behalf, in this Court, was, that the foreign divorce is of no effect here; but, in the face of the findings of the trial Court, such a contention seems to me to be hopeless.

It was urged that the divorce was decreed against "natural justice;" a contention which comes with ill grace from one who himself had sought, in the same Court and in the same way, a like divorce; and one who, instead of complaining at the time of any injustice, seems to have been well content with it, and immediately afterwards took advantage of it to marry another woman. So that I am inclined to think that, had the decree been refused, the defendant would at that time have designated the refusal unnatural injustice; as well as inclined to think that his notion of natural justice is that which will bend to his needs and desires from time to time.

Had the trial Court found that divorce proceedings were a collusive farce, no great mistake, according to my view of them, might have been made; but I am quite sensible of the fact that my notions of the binding character of the marriage tie may in other countries be called antique nonsense; and the parties, having chosen to become domiciled in the State of Indiana, and to

seek and obtain divorce there, according to the laws of that State, are bound by the decree which was pronounced. Upon all questions of fact respecting the validity of such decree the parties are bound, in this case, by the findings of the trial Court; there is no appeal to this Court in that respect.

I cannot think that any sort of difficulty, in supporting the conviction, arises out of this contention.

But the case reserved is much wider than that; it comprises the question whether sec. 316 of the Criminal Code, upon which the conviction is based, applies to a case such as this. Whether it does or not depends upon the question whether the child was "unlawfully" taken. The order of the foreign Court gave the custody of the child to the mother, at the time; that order was then in force; if it were deemed that, for any reason, it should be rescinded, or curtailed, in respect of her right of exclusive custody, the proper course was to apply to the Indiana Court for relief; it had there been once varied in the defendant's favour at his instance; he had no right to disregard it. It must, I think, be held that it gave the lawful exclusive custody of the child to the mother, at the time in question. Then does the enactment apply to a parent taking his or her child? Prior to the first enactment of the Criminal Code, the exception to the legislation in question was: "2. No person who has claimed any right to the possession of such child, or is the mother, or has claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of getting possession of such child or taking such child out of the possession of any person having the lawful charge thereof." The exception now is: "2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child." So that the enactment would seem to apply to any one doing any of the things against which it is aimed, unless "claiming in good faith a right to the possession of the child;" and the amendment to have enlarged the character as well as the scope of the legislation. If the defendant really believed that the decree was invalid, he was wrongly convicted, but no question has, or probably could be, in this case, re-

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served in that respect; see *Rex v. Watts* (1902), 3 O.L.R. 369, in which the legislation in question was held to be applicable in such a case as this. There is, of course, a vast disparity between this case, in which it is said that the child's welfare and the father's natural feelings impelled his act, and that of taking with intent to steal or for other bad purposes; but there is also a vast difference between the punishments which may be inflicted—from seven years to any shorter term, however short, or, with the consent of the Crown, "suspended sentence;" no minimum imprisonment is prescribed.

For aught that appears in this case, the conviction, in my opinion, ought to stand.

GARROW and MAGEE, J.J.A., concurred.

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Criminal Law—Fraudulent Sale of Land Subject to Equity of Redemption
—*Criminal Code, sec. 421—"Privilege."*

A charge was laid against the defendant under sec. 421 of the Criminal Code, "for that he did, knowing of the existence of an unregistered privilege, being an equity of redemption in favour of J.W. in" certain land, "fraudulently make a sale of the same with intent to defraud:"—*Held*, by the Court, that the acts of the defendant, as stated in the evidence, did not constitute any offence within the meaning of sec. 421. *Per* MEREDITH, J.A., that an equity of redemption is not embraced within any of the words, "sale, grant, mortgage, hypothec, privilege, or incumbrance," in sec. 421. *Per* MAGEE, J.A., that, upon the evidence, there had not in fact, at the time the prosecution was instituted, been any sale by the defendant.

CASE stated by the Judge of the County Court of Peel, before whom, without a jury, the defendant was tried. The charge was laid under sec. 421 of the Criminal Code, "for that he did, knowing of the existence of an unregistered privilege, being an equity of redemption in favour of John Wilson in" certain land, "fraudulently make a sale of the same with intent to defraud." The evidence was made part of the case stated. It shewed that the defendant had sold land with

the fraudulent intention of defeating the unregistered equity of redemption of one Wilson in the land. The trial Judge convicted the defendant, but reserved for the Court of Appeal the question: "Was there any evidence of any unregistered grant, mortgage, sale, hypothec, privilege, or incumbrance, of or upon the said property, within the meaning of sec. 421 of the Criminal Code of Canada, and did the acts of the defendant, as stated in the evidence, constitute any offence within the meaning of the said section?"

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Section 421: "Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding \$2,000, who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or incumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof."

December 8. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

T. C. Robinette, K.C., for the defendant, argued that no offence had been committed within the meaning of sec. 421 of the Code, which had in view the existence of a prior unregistered document, while here there was merely a verbal understanding. The matter was one calling for civil, not criminal process, and in fact a civil action was begun at the same time that the criminal proceedings were instituted.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown, argued that Wilson's right of redemption was a "privilege" within the meaning of sec. 421, and the County Court Judge had held that the defendant had a fraudulent intent, which completed the offence. They referred to *Attorney-General v. Smith-Marriott*, [1899] 2 Q.B. 595, *per* Darling, J., at p. 601, as to the construction which should be given to a statute in such cases.

Robinette, in reply.

December 19. MEREDITH, J.A.:—That the wrong, which the defendant was found guilty of committing, was one coming well within that class of mischief which the legislation in

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question—sec. 421 of the Criminal Code—was designed to prevent, there can be no doubt. That wrong was the selling of the land with the fraudulent intention of defeating the unregistered equity of redemption of Wilson in it.

But that is not the question; the question is, whether that legislation covers the case of an equity of redemption, or is lame in that respect. It covers the case of any “sale, grant, mortgage, hypothec, privilege, or incumbrance:” but is an equity of redemption, in this Province, embraced in any of these words? My answer must be, no. At the trial it was treated as a privilege; but no estate, right, title, or interest in or to lands in this Province is so designated. If the words “right or interest,” or, as usually expressed, “estate, right, title; or interest at law or in equity,” had been added, the legislation would be much more comprehensive; and this case, plainly, would have come within its provisions.

As the legislation is, it must, in my opinion, be held that no offence, against the provisions of sec. 421 of the Criminal Code, was committed in this case, and that the defendant should, therefore, be discharged.

There is, of course, no power in this Court to review the findings of fact.

MAGEE, J.A.:—Case reserved by the County Court Judge of the County of Peel on the trial before him without a jury on the 7th June, 1910.

The defendant is stated to have been charged under sec. 421 of the Criminal Code “for that he did, knowing of the existence of an unregistered privilege, being an equity of redemption in favour of one John Wilson in certain land, fraudulently make a sale of the same with intent to defraud.”

The evidence is made part of the case stated. The learned Judge convicted the defendant, but reserved for this Court this question: “Was there any evidence of any unregistered prior grant, mortgage, sale, hypothec, privilege, or incumbrance, of or upon the said property, within the meaning of sec. 421 of the Criminal Code of Canada, and did the acts of the defendant, as stated in the evidence, constitute any offence within the

meaning of the said section?" Beyond the statement that he made the conviction, the learned Judge does not set out any facts which he found; and the form of the question makes it necessary to consider whether any equity of redemption as charged existed, as well as whether the act of the defendant constituted a breach of the section referred to.

The case for the Crown was that a registered deed made in 1905 by John Wilson, granting to the accused, Frank McDevitt, two acres of land, for the expressed consideration of \$108, though absolute in form, was in reality only made to secure repayment to the grantee of that sum with interest—so that Wilson had an equity of redemption in the property, of which there was no notice on the registry books, and that Frank McDevitt, knowing of the existence of that equity, on the 2nd May, 1910, by deed granted the land by way of sale to his brother, John McDevitt, for the expressed consideration of \$108, with intent to defraud Wilson.

It appears that the two acres had once formed part of a farm owned in 1905 by John McDevitt, then living in Toronto, and Frank McDevitt lived on or near the farm. Wilson owned and lived on the two acres, on which there was a house and stable. He professes to value the property at between \$500 and \$600—others at considerably less. There was or had been \$300 or \$400 fire insurance. He is spoken of as an old man, and he cannot read or write.

In April, 1905, there was a mortgage on the property to Mrs. Curry, and she was pressing for payment, the amount owing being \$108. In April, 1905, he applied to Frank and John McDevitt for that amount, to pay off Mrs. Curry. He had spoken to a Mr. Smith, who declined because it was too small, and John McDevitt says Wilson told him that Smith led him to believe he could not get it on a mortgage, and that Wilson offered to deed the place, but he, John McDevitt, thought he was willing to give the deed as security, and he says Wilson offered to make improvements. John McDevitt referred him to Frank, who seems to have made demur, and, the two brothers being together at Wilson's place, he told John McDevitt of Frank's hesitation, whereupon John McDevitt

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said to his brother to give Wilson the money, and he would take it off Frank's hands any time, as it was alongside the farm. Frank said "all right," and shortly after he and Wilson went to a solicitor, Mr. Heggie, and a deed in duplicate was drawn up and executed by Wilson, purporting to convey the land absolutely to Frank McDevitt for \$108. Wilson says he left the preparation of the papers to Mr. Heggie. Presumably the money went to pay off the mortgage. Wilson denies that the deed was read over and explained to him, and says he thoroughly understood he was signing a mortgage such as Mrs. Curry had, and he would not have signed if he had known that it was an absolute deed. Frank McDevitt says it was read over and explained to Wilson, but he does not say what the explanation was. Mr. Heggie is dead, and the subscribing witness, though said to be present at the trial, was not called for the defence. Wilson says he understood he was to pay the same interest as Mrs. Curry was getting, and he was to have five years to repay, but McDevitt was to take the money sooner if he could pay it, and he admits having spoken of expecting to pay most of it in a year if some pigs turned out well, but no particular time was mentioned within which it was to be paid, and it would be about three years to the best of his opinion. Frank McDevitt asserts that the money was to be paid back in a year, and in one place says "a year or so," and admits that Wilson spoke of paying most of it in a year if the pigs did well. Frank McDevitt also says that the deed was taken merely as security for the \$108. The deed was duly registered. Wilson continued in possession. He became ill, and was unable to work for two years, and made no payment till 1908, when he paid \$10 on account, but no receipt was asked or given. He says he then told the defendant that he thought the mortgage would be due the following year. The defendant says he took the \$10 as on a repurchase, but he does not say he told Wilson so. Then matters went on as before, until, in February, 1910, the defendant went to Wilson and said he wanted the money, as he was going west, and he says he wanted Wilson to settle up. Wilson said it was not convenient to pay it just then, but, if McDevitt had to have it before he went away, he must get it

for him. In March, 1910, Wilson was incarcerated, charged with some offence. He sent for the defendant and asked him if he had arranged about the money or how he was going to do, but nothing seems to have been decided on. Later, McDevitt went to see Wilson again at the gaol, and spoke of getting the fire insurance corrected, it being described as on the wrong property. The evidence is not very clear, but it would seem that during all this time the property was insured by Wilson as being his own, but mortgaged to the defendant, and Wilson paid the premiums. The defendant does not seem to have objected to it being so insured until after this prosecution was launched. During Wilson's occupation after April, 1905, he made improvements on the buildings, fences, and gates, and planted trees. Wilson's trial was to take place on the 3rd May. On the 2nd May Frank McDevitt went to the gaol, and, according to Wilson, asked him to give him an order for Wilson's chattels, but the latter refused, as he expected to get out, and wanted the chattels himself. The defendant denies this, but does not say why he was there. If it took place, he was apparently treating Wilson as his debtor. While they were together, Mr. Blain, counsel for Wilson's defence, entered and spoke of bail, as the trial was not to go on, and of the value of the property as security for the bondsmen. Mr. Blain's evidence is uncontradicted as to Wilson then referring him to Frank McDevitt as the holder of the mortgage on the property, and the latter correcting him as to the amount being under \$100, and saying it was \$150, and calling Mr. Blain out and telling him he held a deed, but admitting that Wilson had the right to pay it off, and that there was no doubt about Wilson's being entitled to the place when he paid the money. He and Mr. Blain went to the office of the solicitor who had Mr. Heggie's papers, and he calculated the amount owing as \$125. Mr. Blain suggested that he give Wilson a deed and take a mortgage, but the defendant replied: "No, if I do that the old man will deed the place to somebody else, and it is off my brother's place, and he wants it." After about an hour's discussion, Mr. Blain left him, saying he would get the money and get a deed of the place again. That was between four and six p.m. on the 2nd May.

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Here, then, we have a transaction in which no such words as buying, selling, reselling, or repurchasing were hinted at on either side, in which there is no discussion of value, and in which the alleged vendor is to remain in possession and is to go on and make improvements, and does so. Nothing is said about insurance or rent.* Wilson asked the money to pay a mortgage to enable him to keep the property, not to part with it, and there is discussion about when he will repay and an understanding about interest. According to the two McDevitts, the word "deed" was mentioned, and according to their mother, who might easily have forgotten the exact words, Wilson spoke of having made over and deeded the place to Frank, but both the brothers knew that the deed was only spoken of as a security, and the defendant admits that was all it was. Then the subsequent conduct of the parties is more in accordance with the position of mortgagor and mortgagee as to possession, improvements, insurance payment, and requests for settlement. It is clear that the learned Judge was warranted in considering that the deed was only a security, and that in equity Wilson was entitled to redeem the property.

Then comes the next step. Immediately after Mr. Blain had left him intending to get the money and force him to reconvey, the defendant consulted the solicitor, Mr. Irvine, as to whether he could sell the property. His examination goes on: "Q. Were you told by him you could transfer the property? A. He said I had a perfect right . . . Q. Did you think you were giving Mr. Blain reasonable time to get the money? A. I asked my solicitor about it; he said I had a perfect right to sign it over to my brother or to any one I wanted to." Thereupon a deed was prepared from Frank McDevitt to John McDevitt, purporting to convey the land absolutely to the latter, for the consideration of \$108, and it was executed by the former within an hour after his interview with Mr. Blain. It was registered the next day. The expense of drawing the deed and registration was charged by the solicitor to him. John McDevitt knew nothing of it, and had not given any authority for it, so far as appears, beyond his statement in 1905 that he would at any time take it off his brother's hands, except that the latter

says, in an unsatisfactory way, that he had spoken to John McDevitt, may be, a year ago, but we are not told what passed, and John McDevitt makes no mention of it.

This prosecution and a civil action for redemption were commenced on the 4th May, and, when John McDevitt was served with the writ in that action, he did not know of the deed having been made. It is very difficult to make out his position with regard to the deed. These questions and answers appear in his examination in chief: "Q. You learned about this deed, you were willing to accept it? A. Sure, at whatever was coming from John (Wilson)." On cross-examination: "Q. You didn't know anything about the deed to you? A. I expected he might do it any time." Then on re-examination: "Q. You haven't paid the \$108? A. No. Q. You have never accepted the deed except that it was put in the registry office? A. No. Q. You are willing to pay it back at any time and give him back the deed? A. Yes." What this last question means it is impossible to say. Perhaps it was intended to ask as to his willingness to reconvey to his brother, or perhaps to Wilson. He does not seem ready to admit notice of Wilson's right. Although, as already mentioned, he thought Wilson offered the deed as security, this is his answer when asked: "Q. You always understood, of course, all he had to do was to repay the money? A. That is Frank—I don't know much about it. I don't know whether they had any private agreement other than the deed."

When served with the writ and expressing ignorance of the deed, he said "he knew that Wilson owed Frank money." No other debt than this \$108 is suggested throughout the evidence.

What the defendant's intentions were in making the deed is another question. He had consulted the solicitor, he says, as to whether he could sell, but his answers, already quoted, do not say that he was advised that he could sell. The only question put to him as to what he did—beyond executing the deed—was: "You make (made) the transfer to your brother John? A. Yes." The solicitor, Mr. Irvine, is only asked: "Then there was a transfer made to Mr. John McDevitt? A. Yes."

In the questions and answers the words "transfer" and "sign over" are used, but not the word "sell." Undoubtedly

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he had a right to transfer his security. There is equal uncertainty about what John McDevitt was willing to do. He had said he would "take it off his hands." That presumably would be what he would expect to be called upon to do. Frank McDevitt is asked: "Q. Why was the consideration made \$108, instead of \$125? A. I let it go to him the same as it had cost me. Q. Hadn't it cost you anything for interest? Did you know your brother would take it? A. Yes. Q. How did you know that? A. He told me. Q. Five years ago? A. Yes, and I spoke to him after that."

This would seem more like a transfer of the investment or security than a sale of the land taken by itself. It bears a more sinister aspect when we find it done within an hour after Mr. Blain left him intending to get the money, and done for \$108, when he might expect \$125 from Blain, and done after giving as a reason for not taking a mortgage that Wilson might deed to some one else, and it was off the brother's farm and the brother wanted it, and done after consulting a solicitor as to whether he could sell or not. He calls witnesses to prove that its saleable value did not exceed \$125. I cannot but come to the conclusion that he intended a sale of the land to his brother and thereby to cut out any rights of Wilson. Whether he did that fraudulently within the meaning of sec. 421 is another matter. It might be a high-handed and very improper and reckless exercise of a right of selling which he thought he had. The fact that a deed was taken, instead of a mortgage, cannot be eliminated.

I am not satisfied that Wilson did not know that he was signing a deed. Why was a mortgage avoided if not that the parties thought that in some way the expense of proceedings under a mortgage would be escaped on such a small transaction? It would not be an unreasonable thing for the defendant to think that in some way he had a better and cheaper right of selling than under a mortgage. He may have acted unreasonably and illegally in attempting to sell as he did, but one is not driven to conclude that he was seeking to take advantage of the non-registration of a claim which he supposed to exist, instead of trying to cut out a claim which he supposed he had a right to cut out, or which he supposed to have legally expired.

Section 421 of the Criminal Code reads as follows: "Every one is guilty of an indictable offence . . . who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or incumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof."

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It was argued that to be unregistered within the meaning of the section there must be something in writing, something which could be registered, and also that an equity of redemption did not come within its wording. I am not at present prepared to assent to either of these propositions, though much may be said in support of the latter at least. But it is not, I think, necessary to consider them. The case can and should be disposed of on the short ground that, at the time this prosecution was instituted, there had not in fact been any sale. Two are required—a vendor and a vendee. John McDevitt had not known of the intended sale. It is left doubtful upon the evidence what his present attitude is. He certainly did not pay for it. He says he did not accept the deed. Manifestly to excuse his brother, he says he expected he would deed it at any time. He was ready to implement his promise of five years ago, but that promise could not necessarily be construed to be more than a promise to take the security, including John Wilson's liability, off his brother's hands. That very promise was made at a time when he had express notice that the deed was being offered only as security, and he had known that Wilson had been in occupation ever since and knew that he was indebted to Frank McDevitt. He was not consulted as to his readiness to make a purchase of the land at an undervalue, in the face of his knowledge of such facts and possible litigation, and the evidence has not shewn that he was a party to any such purchase. Possibly, had the prosecution been less hasty, he would have declared his acceptance, but until he had done that it could not be said that there were the two parties assenting to a transaction of which one of them knew nothing. There is, therefore, to my mind, no proof that a sale was made.

Two questions are presented to the Court in the form of one. The second question asked should, in my opinion, be answered

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in the negative—and it then becomes unnecessary to answer the first.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., agreed in the result.

By the Court: Questions answered as follows, viz.: That the acts of the defendant, as stated in the evidence, did not constitute an offence within the meaning of sec. 421 of the Criminal Code; and that the conviction be set aside.

[IN THE COURT OF APPEAL.]

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REX v. YUMAN.

Criminal Law—Neglecting to Provide Necessaries for Wife—Previous Acquittal on Like Charge—Evidence of Conduct before Acquittal—Inadmissibility—Lawful Excuse—Inability of Prisoner—Evidence—Submission to Jury.

The defendant was in September, 1910, tried and convicted on a charge of refusing, neglecting, and omitting, without lawful excuse, to provide necessaries for his wife, by means whereof her health was then and was likely to be permanently injured. In July, 1909, the defendant had been brought before a magistrate on a charge of neglect and non-support of his wife, under the same provisions of the Criminal Code upon which the subsequent prosecution was founded, and, electing to be tried summarily, was, after trial, acquitted by the magistrate. At the trial in September, 1910, evidence was admitted, against objection on the defendant's behalf, tending to shew harsh conduct towards and neglect of his wife by the defendant, before the former trial and acquittal, and the effect upon her health, the ground of admission being that such conduct might or would have some bearing on her then (September, 1910) condition of health:—

Held, that the evidence was improperly admitted.

The defendant gave evidence on his own behalf, and, amongst other matters, deposed as to his ability to earn money and the means at his command to enable him to support or provide necessaries for his wife:—

Held, that the trial Judge should have told the jury that, in case they were satisfied that the defendant had not the ability to provide necessaries for his wife, they could find him "not guilty," and the question of his ability should have been left to the jury. The question of lawful excuse is to be determined upon all the facts and circumstances, the onus being upon the Crown.

CROWN case reserved.

The following statement of the facts is taken from the judgment of MOSS, C.J.O.:—

The defendant was tried at the General Sessions of the Peace for the County of York, before DENTON, Junior County Court Judge, and a jury, and convicted, on a charge of refusing, neglecting, and omitting, without lawful excuse, to provide necessaries for his wife, Grace Yuman, by means whereof her health was then and was likely to be permanently injured.*

The trial took place on the 30th September, 1910. It appeared that, about two years before, the defendant was brought before the Police Magistrate on a charge of assaulting his wife and then pleaded guilty and was sentenced to ten days' imprisonment. While he was in gaol, his wife removed her furniture from the house in which they had been living together, and went to reside elsewhere. After the defendant's term of imprisonment expired, his wife continued to reside apart from him, and never applied to him to receive her back or to support her. In July, 1909, she caused him to be brought before Police Magistrate Kingsford on a charge of neglect and non-support of his wife, under the provisions of the Criminal Code upon which the prosecution in the present case is founded. He then elected to be tried summarily, and, after trial, was acquitted by the magistrate.

At the last trial evidence was admitted, against objection on the defendant's behalf, tending to shew harsh conduct towards and neglect of his wife by the defendant, prior to the former trial and acquittal, and the effect upon her health, the ground of admission being that such conduct might or would have some bearing on her present condition of health.

The defendant gave evidence on his own behalf, and, amongst other matters, deposed as to his ability to earn money and the means at his command to enable him to support or provide necessaries for his wife. The learned Judge was asked and declined to submit this to the jury.

The following questions are submitted for the opinion of this Court, viz. :—

*Criminal Code, sec. 242—2. Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured, by such omission.

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1. Was I right in admitting evidence for the prosecution of what took place prior to the trial and acquittal of the prisoner in July, 1903, for omitting to provide necessities for his wife?

2. Should I have told the jury that, in case they were satisfied the prisoner had not the ability to provide necessities for his wife, they could find him "not guilty," and should I have left the question of such ability to the jury?

3. Should I have told the jury that, if they found the prisoner's wife never offered to return to her husband and never asked for necessities from him after the said trial and acquittal in July, 1909, they would be justified in rendering a verdict of "not guilty?"

December 8. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

T. J. W. O'Connor, for the defendant. The first question in the case is as to the admissibility of evidence for the prosecution as to what took place before the acquittal of the defendant when tried before a magistrate on a similar charge in July, 1909. It is submitted that up to that point at all events the defendant is entitled to a "clean slate." As regards the second point, it is submitted on behalf of the defendant that the question of his ability to support his wife should have been left to the jury as an element in the case. It is a hardship not contemplated by the law that a man should be sent to gaol because he is too poor to support his wife. Reference was made to the following cases and authorities on this point: *Regina v. Robinson* (1897), 28 O.R. 407, *per* Falconbridge, J., at p. 408; *Regina v. Nasmith* (1877), 42 U.C.R. 242, 249; *Rex v. Saunders* (1836), 7 C. & P. 277; Roscoe's Crim. Ev., 13th ed., p. 329, citing *Regina v. Chandler* (1855), Dears. C.C. 453, and *Regina v. Rugg* (1871), 12 Cox C.C. 16; *The Queen v. Ryland* (1867), L.R. 1 C.C.R. 99.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown. As to the first point in the case, it is submitted that non-support is a continuing offence, and the evidence of the defendant's conduct prior to his acquittal before the magistrate is, therefore, admissible: Roscoe's Crim. Ev., 13th ed., pp. 77, 78. As regards

the second point, the evidence shews that the defendant had ability to provide for his wife, and, even if the Judge was wrong in telling the jury that inability was not an excuse, no objection is taken in the charge in that respect on the question before the Court. As to the third point in the case, the evidence of cruelty and ill-treatment of his wife by the defendant shews that she was justified in leaving him, and that she was in the same position as if he had turned her out of the house: *Hodges v. Hodges* (1796), 1 Esp. 441; *Griffith v. Paterson* (1873), 20 Gr. 615.

O'Connor, in reply.

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December 19. Moss, C.J.O. (after stating the facts as above):—Dealing with the questions in their order, so far as necessary for the disposal of the case, I am of the opinion that the first question should be answered in the negative. It is clear that the indictment was for an offence subsequent to the former trial and acquittal. If it had not been, but was for the identical offence or any other of which the defendant might have been convicted under the former charge, the acquittal was conclusive.

As matters stood at the last trial, the defendant had been cleared of all grounds of offence up to and inclusive of the day of his acquittal in July, 1909. If the defendant was to be convicted, it could only be on proof of acts and omissions subsequent to that date. The admission of evidence as to what had been done or omitted before that date was an infringement of the rule which forbids that a person shall be twice placed in jeopardy for the same offence. The defendant could not be expected to be prepared, nor should he have been called upon to answer evidence of that nature. And its introduction was calculated to prejudice his case with the jury.

As to the second question, it must be borne in mind that not every case of neglect or omission to provide necessaries for a wife renders the husband criminally responsible.

It must be alleged and the jury must be satisfied that the omission was without lawful excuse, and that the death, if death followed, was caused, or, if death had not happened, that her life was endangered or that her health was or was likely to be permanently injured, by reason of the neglect or omission: *The*

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King v. Wilkes (1906), 12 O.L.R. 264, 11 Can. Crim. Cas. 226.
The King v. Wolfe (1908), 13 Can. Crim. Cas. 246.

The question of lawful excuse is to be determined upon all the facts and circumstances, the onus being upon the Crown.

In the present case the defendant's statements as to his ability and means were given in answer to questions by counsel for the Crown; and these, as well as the other statements made by him as to the assistance given to his wife by her children of a former marriage, were matters that the jury should have been allowed to take into their consideration in determining upon the defendant's criminal responsibility. The learned Judge instructed the jury that they should not regard the evidence as to ability and means, and so withdrew from them one element which it was proper they should have taken into consideration. See *Regina v. Robinson*, 28 O.R. 407, 1 Can. Crim. Cas. 28.

The third question does not appear to have been distinctly raised, nor was the learned Judge asked to instruct the jury upon it, in such form as to enable it to be dealt with. Other facts and circumstances might need to be taken into consideration by the jury as in *The King v. Wolfe, supra*. And, as an answer is not necessary to the disposition of the charge against the defendant, it is better, under the circumstances, to leave it unanswered.

The first question should be answered in the negative and the second in the affirmative.

And the conviction should be set aside.

MEREDITH, J.A.:—Upon the first two points, raised in this case, I have no doubt the trial Court erred; and that, in consequence of such error, the prisoner should be discharged.

The third point raises a question which seems to me to have had too little consideration at the trial, and to be one which, with other questions which may arise in cases in which the wife is living apart from the husband, had better be dealt with in a case in which they are better raised and which cannot be fully disposed of without considering them; in this case it is not necessary that the third question should be answered.

As to the admissibility of the evidence, the point is not that it would prove another indictable offence merely, but is, that it

would prove, and render the prisoner liable to conviction upon, another indictable offence of which he had been acquitted. The former acquittal absolved the prisoner from all omissions for which he might have been convicted upon that prosecution. To permit him to be, now, subject to conviction upon any such omission would be, in the circumstances of this case, to permit a conviction for an offence of which he had been acquitted.

Upon the other point, it is not now contended that ability to perform the duty is not an ingredient of the crime. The ruling of the learned Chairman of the General Sessions upon this point—that inability was immaterial upon any question for the jury, and to be taken into consideration only by him in imposing the punishment in case of a verdict of guilty—was erroneous. It would be extraordinary if one were to be adjudged guilty of a crime for omitting to do that which was impossible, in such a case as this. If the wife were living with the prisoner, and as helpful to him as she could be, it may be that they would have enough for the support of both; but, as it was, the evidence upon the question of the man's ability was such that that question could not properly have been withdrawn from the jury; there was no suggestion at the trial that such was not the case; if it were a question for the jury.

In *The Queen v. Ryland*, L.R. 1 C.C.R. 99, it was decided that the word "neglect" imported ability, in a case of neglecting to provide food and clothing for a child: see also *Regina v. Chandler*, Dears. C.C. 453; *Regina v. Rugg*, 12 Cox. C.C. 16; and *The Queen v. Shepherd* (1862), 31 L.J.M.C. 102.

I would answer the first question, no, and the second, yes, and discharge the prisoner.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

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[DIVISIONAL COURT.]

LACROIX V. LONGTIN.

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May 27.

D. C.

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Dec. 20.

Husband and Wife—Agreement by Husband to Convey Wife's Land—Conveyance by Husband—Wife Joining to Bar Dower—Mistake—Claim for Rectification—Innocent Misrepresentation—Estoppel—Specific Performance—Statute of Frauds—Breach of Covenant—Damages—Absence of Proof of Loss.

The defendants were husband and wife. The husband, on the 17th October, 1904, being the owner of land, mortgaged it for \$2,800, the wife joining to bar dower. On the 4th August, 1905, he executed another mortgage upon the land for \$1,000, the wife again joining for the same purpose. On the 16th November, 1906, he conveyed the land, subject to the mortgages, to the wife. This conveyance was registered on the 7th December, 1906. The defendants lived together, occupying the land. On the 13th March, 1908, the plaintiff made an oral agreement with the husband for the purchase of the east half of the land for \$3,200. The plaintiff was to assume the \$2,800 mortgage and give his promissory note for \$400 and interest. Nothing was said about the \$1,000; apparently it was to be paid off by the husband. The wife was present during the negotiation and took part in it, not as a contracting party, but as assenting. Upon the same day a conveyance from the husband to the plaintiff, the wife joining to bar dower, was executed by the defendants, and delivered to the plaintiff, and the note signed and given to the husband. This action was brought for rectification of the deed:—

Held, by BRITTON, J., the trial Judge, that, upon the evidence, there was no fraud on the part of either of the defendants; but that, at the time of the negotiation with the plaintiff, the wife had absolutely forgotten the deed of the 16th November, 1906; that she did not stand by and allow her husband to sell, knowing that the land was hers; and she was not, therefore, estopped from setting up any defence that was available to her. Treating the action as one for specific performance of a contract, it must fail against the wife, the owner of the land; there was no contract with her; the Statute of Frauds was, as to her, a good defence; for the deed signed by her merely to bar dower was not intended by her to authenticate any contract for the sale by her of land to the plaintiff; and there was no part performance by her.

Held, also, *per* BRITTON, J., that the plaintiff was not entitled to recover damages against the husband for breach of the covenant for quiet possession contained in the conveyance of the 13th March, 1908.

Held, by a Divisional Court, affirming the judgment of BRITTON, J., that the plaintiff could not seek relief on any other ground than that of estoppel; and, no tangible detriment having resulted to the plaintiff, the defendants should not be prevented from proving what was the real transaction. There was a mistake common to both sides—a misunderstanding arising out of ignorant silence on the part of the wife—and it has not yet been decided that a married woman is to be held bound by an innocent misrepresentation. The conveyance not having been registered, the note being returned to the plaintiff, and no loss having been sustained by the plaintiff, or attempted to be shewn, neither party had suffered except from the litigation, and the Court should leave them as they were.

ACTION for the reformation of a conveyance, dated the 13th March, 1908, by the defendant Jean Baptiste Longtin, in which

his wife, the defendant Zephirina Longtin, joined to bar dower, of the west half of lot 30 in the 7th concession of the township of Cambridge, in the county of Russell, by "substituting the name of the said Zephirina Longtin for that of the defendant Jean Baptiste Longtin as the grantor and party of the first part in the said deed and by eliminating from the said deed the name of the said Zephirina Longtin as the party of the second part thereto, and the provision in the said deed contained by which the said defendant Zephirina Longtin purported to bar her dower in the said lands."

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The plaintiff, for valuable consideration, agreed to purchase the land in question. The defendant Zephirina Longtin was a party to the negotiations which resulted in the agreement, and the conveyance was prepared and executed and the agreement was carried out upon the supposition that her husband was the owner of the land.

When the conveyance was taken by the conveyancer who prepared it to the registry office for the purpose of registration, it was discovered that the husband had, on the 16th November, 1906, conveyed the land and other land to his wife, in consideration of "love and affection," and that the wife had by the conveyance agreed to pay off an incumbrance which existed on the land, and "to provide all the necessity for the living and keeping of the said party of the first part" (*i.e.*, the husband) "during his old age or at any time that he may become unable to earn his living, and this provision to be a first lien on this land, subject to the present incumbrance;" and that this conveyance had been registered on the 7th December, 1906.

The action was first tried by CLUTE, J., who found that it was not present to the minds of the defendants, during the negotiations with the plaintiff or when the conveyance to him was executed, that the husband had conveyed the land to his wife, and that it was her property; and the learned Judge, therefore, held that there was no agreement by the wife to sell, and that the action, being in effect an action for specific performance, failed.

The plaintiff appealed to a Divisional Court, and upon the argument of the appeal rested his right to relief on the ground of estoppel, contending that the wife, having been a party to the

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negotiations and to the sale by her husband of the land as his own, was estopped from setting up against the plaintiff her title under the conveyance of the 16th November, 1906.

The Court (MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.) were of opinion that, as this aspect of the case was not presented at the trial, it was not unreasonable that an opportunity should be afforded to the plaintiff of establishing the estoppel upon which he relied; and the Court, therefore, directed a new trial; the costs of the last trial to be costs in the cause to the defendants only, and the costs of the appeal to be costs in the cause.

April 14. The second trial of the action took place before BRITTON, J., without a jury, at Ottawa.

N. A. Belcourt, K.C., for the plaintiff.

D. Danis, for the defendants.

May 27. BRITTON, J.:—The defendant Jean Baptiste Longtin was the owner of the west half of lot 30 in the 7th concession of the township of Cambridge. On the 17th October, 1904, he executed a mortgage on that land to the Toronto General Trusts Corporation for the sum of \$2,800, his wife, the defendant Zephirina Longtin, joining for the purpose of barring her dower. On the 4th August, 1905, the defendants executed another mortgage on the said land for the sum of \$1,000 to Mr. George B. Magee. On the 16th November, 1906, the defendant Jean B. Longtin executed a conveyance in fee simple, subject to the mortgages mentioned, of this land to his wife, the defendant Zephirina Longtin. The defendants lived together, occupying this land.

On the 13th March, 1908, the plaintiff negotiated verbally with Jean Baptiste Longtin for the purchase of the east half of this land, for the sum of \$3,200. The plaintiff was to assume the mortgage to the Toronto General Trusts Corporation for \$2,800 and give his promissory note for the sum of \$400, payable seven months after date, with interest at six per cent. per annum.

Nothing was said about the mortgage to Magee. Apparently the understanding was that the plaintiff would assume only the mortgage for \$2,800, and the defendant Jean Baptiste Longtin

was to pay off the mortgage to Magee for \$1,000; but the fact remains that each mortgage covers the whole west half of the lot.

The defendant Zephirina Longtin was present during the whole of the negotiation and took part in it, not for herself as a contracting party, but assenting to what was going on.

When the parties had arrived at an agreement, they went to a local conveyancer, who is not a solicitor. Instead of drawing an agreement, leaving the plaintiff to search the title, and, if satisfactory, to have the proper adjustment made as to taxes, interest on the mortgage, etc., and then to have the conveyance drawn and executed, the conveyancer at once drew the deed making the defendant Jean Baptiste Longtin the grantor, and his wife a party only for the purpose of barring her dower, which was then executed by both defendants, the defendant Zephirina signing at the request of the conveyancer, understanding that to be the wish of her husband. It was understood that possession was to be given to the plaintiff on the 1st April, 1908.

The note was made payable to Jean Baptiste Longtin or order, and was signed by the plaintiff. The defendant Jean Baptiste Longtin took the note, and the plaintiff the deed.

After separating, the defendant Jean Baptiste Longtin began to repent. He was troubled about the mortgage to the Toronto General Trusts Corporation, and was afraid that the plaintiff would make default, and that he, the defendant, would lose the west half of the land—so, when the plaintiff came for possession, it was refused.

On the 10th August Jean Baptiste Longtin wrote to the plaintiff that, as the contract was bad, he had no right to collect the note. On the 17th August the defendants' solicitor wrote to the plaintiff calling attention to the fact that Jean Baptiste Longtin was not—but his wife was—the owner, and further expressing a willingness on the part of Mrs. Longtin to execute a proper deed upon the plaintiff fulfilling all conditions.

The conditions referred to, as appear by the evidence, were discharging the west half from the Toronto General Trusts Corporation mortgage, and paying the \$400 in cash.

The defendants now insist that it was one of the terms of the bargain that the plaintiff should have the west half of the west

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half discharged from the Toronto General Trusts Corporation mortgage.

I find as a fact that, in the negotiation and at the time the deed was signed by the defendants, it was no part of the agreement that the plaintiff should immediately clear the west half, any more than that Longtin should immediately clear the east half of the land. Neither party was able to do this. The plaintiff was simply to assume and eventually pay the Toronto General Trusts Corporation mortgage, and Longtin was to assume and eventually pay the Magee mortgage.

The plaintiff did not answer either letter. The defendants allege that the plaintiff distinctly abandoned his purchase, and told the defendants that they could settle with the conveyancer and keep the land.

The plaintiff denies this, and early in September he went to see the land, and, finding the house unoccupied, took possession and put a padlock on the door. During the following night the defendant Jean Baptiste Longtin broke the lock, re-entered into possession, and has so remained ever since, to the exclusion of the plaintiff.

The plaintiff then for the first time made search at the registry office, and found it true that the deed of the 16th November, 1906, to Mrs. Longtin had been executed and registered. This action was then commenced for rectification of the deed of the 13th March, 1908, by substituting the name of Zephirina Longtin for that of Jean Baptiste Longtin as the grantor, and eliminating the name of Zephirina Longtin, so far as her name appears merely for the purpose of barring her dower.

The plaintiff claims damages, but the action is really in the nature of an action for specific performance of an agreement by the defendant Jean Baptiste Longtin for the sale of land.

The action was first tried by Mr. Justice Clute on the 7th June, 1909, and was dismissed. A new trial was granted mainly on the ground that the point in reference to the estoppel of the defendant Zephirina Longtin, had not been fully presented to or considered by the trial Judge. At the trial before me this point was argued, but only as one of many, and the case was dealt with at large.

As to estoppel, the general rule is "that if a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that that state of facts does not in truth exist."

There are qualifications to this rule. To create estoppel there must be knowledge of the facts as they really exist. When the defendant Zephirina Longtin stood by and heard her husband discuss the sale to the plaintiff, she, acting honestly, was for the time in ignorance of the true state of the title. She is an illiterate woman. There was no reason why she should remember, as there were no creditors, and nothing special to cause her to keep it in mind. They lived together, her husband managing the farm and paying the interest upon the mortgages.

I find as a fact that there was no fraud on the part of either defendant. There was at the time of the negotiation absolute forgetfulness of the deed of the 16th November, 1906. She knew of the conveyance when made, but her condition of mind, at the time the plaintiff was bargaining, was the same as if she had never known of it. It was not a case of standing by and allowing her husband to sell, she knowing it was hers. She is not, therefore, estopped from setting up any defence that is available to her.

There was no contract in fact with her, therefore nothing upon which to found this action, unless it be estoppel, and that fails. See Bigelow on Estoppel, 5th ed., p. 448, and following pages. The plaintiff does not contend that the conveyance to him operates as a conveyance of the wife's land. That is why he seeks rectification, and, for the reasons given, the plaintiff is not entitled to that.

This case is on principle very different from *Hoig v. Gordon* (1870), 17 Gr. 599. See also *McClung v. McCracken* (1883), 3 O.R. 596.

The defendants plead the Statute of Frauds. That, in my opinion, is a good defence as to Mrs. Longtin. The deed signed by her merely to bar dower was not intended by her to authenticate any contract for the sale by her of land to the plaintiff. There was, therefore, no authentication in writing, signed by her, as to the contract which the plaintiff seeks to have performed.

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There was no part performance by Mrs. Longtin. The possession by the plaintiff, for the short time mentioned by him, cannot be part performance. Taking the note was wholly by the husband. No unequivocal act of Mrs. Longtin was shewn in reference to part performance by her of any alleged contract other than agreeing to bar dower.

Even as a matter of judicial discretion, there could be no specific performance awarded. The plaintiff is not, as I have mentioned before, in a position to clear the west half of this land from the \$2,800 mortgage, nor are the defendants able to pay the Magee mortgage.

All the difficulty has arisen from the plaintiff not having the title searched before he closed the alleged bargain.

Then the plaintiff has really sustained but trifling, if any, damage. At the highest the plaintiff valued his equity at \$600. He was to pay \$400; the difference is only \$200.

The item of travelling expenses is small. He made no preparation to bring agricultural implements upon the farm; and generally, even if his account of what took place as to abandonment is more to be relied on than that of the defendants, his action, in April and September, 1908, was such as leads me to conclude that he did not think there was much money in his bargain.

The plaintiff claims damages for breach of covenant for quiet possession. All the covenants are those of the husband alone.

As the plaintiff seeks to remove from the deed the name of the husband as grantor and so as covenantor, and as this action is really not upon the deed, but outside of it, and as he has not brought his action or asked any amendment to entitle him to recover against the defendant J. B. Longtin alone, he is not entitled to recover for that alleged breach. The damages for such would not be more than nominal, even if the plaintiff were entitled.

The plaintiff should not pay all the costs of this litigation. The defendants' mistake or want of recollection has been in part the cause of it.

Upon the following cases, *Dickerson v. Radcliffe* (1900), 19 P.R. 223, and *Murr v. Squire* (1900), 19 P.R. 237, I assume that

I have authority to deal with all the costs of this action, and now do so by directing that the plaintiff pay only the costs of the last trial. There will be no costs of the first trial or of the application for the new trial payable by the plaintiff to the defendants.

Action dismissed with costs of the last trial only, payable by the plaintiff to the defendants.

The plaintiff is entitled to the promissory note for \$400 now in Court. The defendants are entitled to a declaration that the paper purporting to be a conveyance from the defendant J. B. Longtin mentioned in the pleadings and registered on the 8th September, 1908, in the registry office for the county of Russell, as No. 8023, is of no validity or effect.

The plaintiff appealed from the judgment of BRITTON, J.

December 16. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and SUTHERLAND, JJ.

H. S. White, for the plaintiff. From the judgment of the Divisional Court on the first appeal it is clear that that Court was of opinion that this is a case in which the doctrine of estoppel may apply. No new evidence was given on the point at the second trial, and the finding that the wife had entirely forgotten the deed from her husband to herself cannot be supported. If she had not forgotten, estoppel clearly applies. But, even if she had forgotten, mere forgetfulness is not sufficient excuse. The whole question is one of intention. It is clear that all parties were content at the time the deed was drawn, and, had the conveyancer known the true state of the title, he would have drawn a proper deed and the wife would have signed it. She admits that in the first place she was satisfied with the bargain. Reference was made to *Burrowes v. Lock* (1805), 10 Ves. 470; *Hobbs v. Norton* (1682), 1 Vern. 136; *Hunsden v. Cheyney* (1690), 2 Vern. 150; *Low v. Bouverie*, [1891] 3 Ch. 82; *Re Shaver* (1871). 3 Ch. Ch. 379. The Statute of Frauds cannot be invoked to support the defendants' case. The deed should be held to constitute a sufficient agreement in writing to satisfy the statute, and the Court should correct the error as to parties in the same way as errors of description are corrected.

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J. A. Macintosh, for the defendants. The plaintiff's principal contention is that, in the circumstances of this case, the defendant Zephirina Longtin is estopped from denying that the land in question was her husband's at the time of the conveyance. The defendants rely on the findings of fact of the trial Judges to the effect that the defendants had forgotten the previous conveyance from the husband to his wife at the time of the conveyance to the plaintiff; the latter was made, therefore, under a mistake of fact: see *Hood of Tavalon (Lady) v. Mackinnon*, [1909] 1 Ch. 476. The usual rule in estoppel is that the representation must be wilful and intentional: *Pickard v. Sears* (1837), 6 A. & E. 469; *Freeman v. Cooke* (1848), 2 Ex. 653; *Carr v. London and North Western R.W. Co.* (1875), L.R. 10 C.P. 307. In cases like this, where the representation is innocent, before the rule of estoppel can be invoked, the representation must be clear and unambiguous, and must result in the party to whom it is made changing his position. Here, if there was any representation, it was ambiguous, and the position of the parties was not changed. See *Low v. Bouverie*, cited on behalf of the appellant; *Bell v. Marsh*, [1903] 1 Ch. 528. Further, this is substantially an action for specific performance, which, in the circumstances of this case, the Court should, in its discretion, refuse to decree.

White, in reply.

December 20. The judgment of the Court was delivered by BOYD, C.:—This case has been twice tried, and on each occasion the Judge has found that the woman believed that the land being sold was the land of her husband, and that she signed barring her dower under that misapprehension. She says, had she known that she was the owner, she would not have sold on the terms which satisfied her husband. There was a mistake common to both sides: the plaintiff believed that the husband was the owner, and the conveyancer who acted for both vendor and purchaser shared in the mistake. The title was registered, and any search would have disclosed the fact that the husband had, two years before, conveyed to the wife. But I can well understand, from the ignorance of both, that the legal effect of the transfer was not appreciated by either. The wife could have no object in seeking

to conceal or to mislead on a matter that was disclosed to the world by the registration—she acted, I think, in simple ignorance of her title.

Now the parties are precisely where they were at the outset—no change of possession, no payment of money, and no action taken by the plaintiff as the result of the wife's silence calling for the equitable interposition of the Court. He was to buy the land and pay for it by a note of \$400 and the assumption of a mortgage which covers this and other lands belonging to husband or wife. The note has been returned to him, and he entered into no written engagement to pay the mortgage. I think it is pretty clear that this term of assuming the mortgage was not explained to or understood by husband or wife. They had the idea that the mortgage was to be cleared off by the purchaser, so that this other land would be free; and they offered to carry out the transaction if this could be adjusted.

The plaintiff cannot seek relief on any other ground than that of estoppel; but, when no tangible detriment has resulted to the plaintiff, I do not think the defendants should be prevented from proving what was the real transaction. So far as appears, the plaintiff does not suffer in pocket or in prospect from losing the land, and the defendant does not appear to have withdrawn because of any enhanced value in the land. Both parties have blundered, neither has suffered except from this litigation, and the Court should leave them as they are. The deed has not been registered, and the dismissal of this action will leave everything as it was.

At the most, there was here nothing but misunderstanding arising out of ignorant silence on the part of the married woman. I do not think it has yet been decided that a married woman is to be held bound by an innocent misrepresentation—and the only possible measure of relief to the plaintiff would be that he should get compensation for any loss occasioned by the defendants' silence, but no such loss has been sustained or sought to be proved.

The costs of the appeal should be borne by the plaintiff.

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Banks and Banking—Powers of Provisional Directors—Payment of Commissions for Obtaining Stock Subscriptions—Bank Act, R.S.C. 1906, ch. 29—Breach of Trust—Winding-up of Bank—Liability of Directors to Liquidator—Limitation—Payments not Directly Authorised by one Director.

The Dominion Act incorporating the bank, 4 & 5 Edw. VII. ch. 125, was in the form set forth in schedule B of the Bank Act, R.S.C. 1906, ch. 29, and, while it named the provisional directors, conferred no special powers on them:—

Held, that the powers of the bank, and of the provisional directors acting for it, depended entirely upon the provisions of the Bank Act; and the provisional directors had no power to authorise payment out of the funds of the bank of commissions to persons who obtained subscriptions for shares of the capital stock; and, in the winding-up of the bank, under the Dominion Winding-up Act, they were properly found liable, upon the ground of breach of trust or misfeasance, to pay to the liquidator the sums which had improperly been paid under their authority.

Provisions of the Bank Act considered.

Quære, whether even shareholders' directors would have authority under the Bank Act to pay commissions for obtaining subscriptions for stock. One of the provisional directors did not authorise or direct to be paid any money for commission, except in one instance, when he, with the others, signed a cheque for \$700 "on account of commissions;" at most he was aware of other payments being made by his co-directors:—

Held, following *Young v. Naval Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K.B. 687, that he was liable for the \$700 only.

APPEALS by Ostrom and others from the judgment and report of J. A. McAndrew an Official Referee, upon a reference for the winding-up of the bank, holding the appellants liable to the liquidator for breach of trust or misfeasance under sec. 123 of the Winding-up Act.

November 3. The appeal was heard by TEETZEL, J., in the Weekly Court at Toronto.

A. B. Morine, K.C., for the appellants Ostrom, Graham, and Livingstone.

H. E. Rose, K.C., for the appellants Kerr, Mackenzie, and Perfect.

C. A. Masten, K.C., and *M. C. Cameron*, for the liquidator.

December 23. TEETZEL, J.:—The appellants were provisional directors of the Monarch Bank, which was incorporated

on the 20th July, 1905, by 4 & 5 Edw. VII. ch. 125, and the time for obtaining the certificate under sec. 14 of the Bank Act was extended until the 20th July, 1907, by 6 Edw. VII. ch. 127.

The acts for which the learned Referee found the appellants to be liable were the payments of money received by them by or on behalf of the bank without any statutory or other authority for such payments.

The provisional directors succeeded in collecting from subscribers for stock about \$70,000, and disbursed for general organisation expenses and for commissions of \$10 per share to one Gordon, under what was styled an "underwriting agreement," and the like sum per share to several agents who canvassed subscribers for stock, and a further \$1.50 per share to the appellant Ostrom in respect of a large number of shares.

The total expenditures, including commissions paid, amount to about \$39,000, of which sum the learned Referee held that \$22,574.07 was unauthorised, and that the appellants were liable to repay the same to the liquidator.

About \$21,000 of the latter sum was made up of commissions above mentioned, and the balance consisted of directors' fees and legal expenses in connection with obtaining the charter and organisation, and the ruling as to these was not contested in the appeal. The balance of the \$39,000 appears not to have been objected to by the liquidator, and was therefore allowed by the learned Referee.

In the prospectus issued and form of subscription agreement submitted to the prospective shareholders by the provisional directors, provision was made for issuing the shares at a premium of \$25. The amount actually paid in on account of premiums on the stock subscribed for was in fact less than the amount of expenses which the learned Referee allowed as properly disbursed by the provisional directors.

The substantial question involved in the appeal is, whether the payments of \$10 and \$1.50 per share as commission for obtaining subscriptions were within the powers of the provisional directors under the Bank Act, R.S.C. 1906, ch. 29, the learned Referee having held that they were not.

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The Act incorporating the bank was in the form set forth in schedule B of the Bank Act, and, while it named the provisional directors, conferred no special powers on them; but sec. 9 of the Bank Act enacts that "An Act of incorporation of a bank in the form set forth in schedule B of this Act shall be construed to confer upon the bank thereby incorporated all the powers, privileges and immunities, and to subject it to all the liabilities and provisions set forth in this Act."

The powers of the bank, and of its provisional directors acting for it, must, therefore, depend entirely upon the provisions of the Bank Act.

The power of provisional directors of a bank under our Bank Act do not heretofore appear to have been judicially considered.

In *Michie v. Erie and Huron R.W. Co.* (1876), 26 C.P. 566, the powers of provisional directors of a railway company were considered. At p. 576, Chief Justice Hagarty says: "There must be some reason for calling them provisional directors. The only rational meaning I can attach to the term is, that they are to perform certain limited and temporary functions, existing, as it were, merely until the complete machinery provided by law may be provided . . . I repeat that I cannot see how these fifty-five directors can be allowed not merely to impose any burden, however onerous, on those who may afterwards become shareholders, which burden is not in any way to affect the persons imposing it, but is made up of sums voted by themselves each to the other for alleged services. I see no way by which these, to me, startling results can be avoided, except by holding that the persons provisionally appointed by the statute are mere trustees for the carrying out of a plain simple duty, and that in the performance of that duty they are to derive no personal advantage, and to create no unnecessary burden on those who subscribe for shares in the undertaking."

The decision in the recent case of *Monarch Life Assurance Co. v. Brophy* (1907), 14 O.L.R. 1, also demonstrates the necessity for strictly confining the powers of provisional directors to those expressly conferred by statute.

It is to be noted that the statutory powers expressly con-

ferred upon the provisional directors in both of these cases were wider than those conferred by the Bank Act. See also *In re North Simcoe R.W. Co. and City of Toronto* (1874), 36 U.C.R. 101.

The only powers and duties of provisional directors under the Bank Act which are expressly conferred and imposed are set forth in secs. 12 and 13 as follows:—

“12. For the purpose of organising the bank, the provisional directors may, after giving public notice thereof, cause stock books to be opened, in which shall be recorded the subscriptions of such persons as desire to become shareholders in the bank.

“2. Such books shall be opened at the place where the chief office of the bank is to be situate, and elsewhere, in the discretion of the provisional directors.

“3. Such stock books may be kept open for such time as the provisional directors deem necessary.

“13. So soon as a sum not less than five hundred thousand dollars of the capital stock of the bank has been *bonâ fide* subscribed, and a sum not less than two hundred and fifty thousand dollars thereof has been paid to the Minister, the provisional directors may, by public notice, published for at least four weeks, call a meeting of the subscribers to the said stock, to be held in the place named in the Act of incorporation as the chief place of business of the bank, at such time and at such place therein as set forth in the said notice.

“2. The subscribers shall at such meeting,—

“(a) determine the day upon which the annual general meeting of the bank is to be held; and,

“(b) elect such number of directors, duly qualified under this Act, not less than five, as they think necessary.

“3. Such directors shall hold office until the annual general meeting in the year next succeeding their election.

“4. Upon the election of directors as aforesaid the functions of the provisional directors shall cease.”

The term “provisional directors” is not used anywhere in the Bank Act except in these two sections and in sec. 8, which enacts that the name of the provisional directors shall be de-

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clared in the Act of incorporation, and in sec. 11, which provides that the number shall not be less than five, and that they shall hold office until directors are elected by the subscribers to the stock.

Section 14 provides that the bank shall not issue notes or commence the business of banking until it has obtained from the Treasury Board a certificate permitting it to do so, and that no application shall be made until the directors have been elected by the subscribers.

Section 16 provides that no such certificate shall be granted except within one year from the passing of the Act of incorporation.

In all the provisions of the Act, subsequent to sec. 13, which confer powers upon the directors, it is plain that only the directors elected by shareholders are contemplated.

Section 19 enacts: "19. The stock, property, affairs and concerns of the bank shall be managed by a board of directors, who shall be elected annually in manner hereinafter provided, and shall be eligible for re-election."

As regards the respective powers of provisional directors and shareholders' directors, the scheme of the Act clearly is that the powers of provisional directors are to be strictly limited to those specifically granted for the purpose of getting the bank started as a business concern; and, except under contract with the subscribers, in my opinion, they have no right to make or enforce payment of calls, nor, as pointed out by Mr. Justice Maclaren in his treatise on Banking, 3rd ed., p. 20, have they any express power of excluding subscribers in default from taking part in the organisation of the bank.

For all that appears in the Act, it is assumed that the whole \$250,000 shall be paid voluntarily. The only case cited as an authority for provisional directors making calls on stock was *North Sydney Mining and Transportation Co. v. Greener* (1898), 31 N.S.R. 41; but that case furnishes no assistance in determining the powers of provisional directors under the Bank Act, because in that case the incorporating Act expressly authorised the provisional directors to "exercise all the powers of ordinary directors of the company, under the provisions of the Act," and one of those powers would be to make calls.

From the limited powers conferred upon the provisional directors under the Bank Act, and the absence of any express authority to apply money paid by subscribers to any purpose except in paying the \$250,000 to the Minister, it is not unreasonable to assume that, when a petition is presented to Parliament for the incorporation of a bank, the legislature in granting the privilege intends only to grant the same for the purpose of enabling the petitioners (presumably men of substance) and their financial friends, who, in the words of sec. 12, "desire to become shareholders," to establish a banking corporation. It cannot be assumed that the Legislature intended, in passing an Act incorporating a bank, merely to furnish enterprising but impecunious promoters and their friends the means of exploiting the general public for subscriptions, with the absolute right, without consent of any one interested in the moneys paid, to deduct therefrom \$10 or more per share as a reward for their enterprise, and with only an off chance that a new banking institution may be established.

Nor can it be supposed that the Legislature intended that, if \$500,000 should be subscribed and \$250,000 paid in, the bank should start business with its capital impaired or with a liability to the extent of over \$50,000 for commissions on stock subscriptions. Much less could it have been contemplated that, if only a few thousand dollars were actually paid in, the same could be absorbed at the will of the provisional directors in commissions and other promotion expenses. If either of such deplorable results is possible, under the present legislation, it is high time for a change to be made in the law.

As stated by Mr. Weir in his Law of Banking, p. 53: "In granting Acts of incorporation to banks, the manifest intention of the Legislature is to afford additional accommodation to the business community, to provide safe institutions of deposit for the accumulations of the public, and to facilitate mercantile transactions by providing safe credits and a circulating medium."

The Bank Act is full of most exacting restrictions upon the powers and privileges granted by the Legislature, for violation of which severe penalties are imposed. Having regard, there-

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fore, to the whole scope and purpose of the Bank Act, and to the limited powers expressly conferred on provisional directors, I cannot think that the Legislature intended to empower provisional directors to enter into contracts which, assuming that no other expense or liability was incurred in the process of organisation, if the organisation were successful, would involve the bank in a liability of over \$50,000 for commissions upon the minimum subscription of \$500,000 provided for in sec. 13.

In the course of his very able argument for the appellants, Mr. Morine invoked the principle of construction laid down by Lord Selborne in *Attorney-General v. Great Eastern R.W. Co.* (1880), 5 App. Cas. 473, and repeated by him in *Small v. Smith* (1884), 10 App. Cas. 119, at p. 129, that "when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, *primâ facie*, to follow from the authority for effectuating the main purpose by proper and general means. . . . In order to see how it applies, we must ascertain first of all what the main purpose here is, then what are the general powers of the directors, then what are their special powers, and then, supposing that this is not within the natural meaning either of their general powers or of their special powers, whether it can be brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it."

Now, the main purpose to be attained by the provisional directors being to organise the bank as a business enterprise, can it be said that either the general or special powers expressly given them are sufficiently explicit to include the power in question in this appeal, within the natural meaning of the language conferring those powers, and, if not, can it be brought in as incidental to the main purpose and a thing reasonably and properly to be done for effectuating it?

For the reasons before pointed out, and having regard to the objects of the Act, I think it is plain that such a power is not within the natural meaning of the language of secs. 12 and 13. The most that can be embraced within the express langu-

age, or as necessarily incidental to accomplishing the main purpose, would be the authority to acquire necessary stock books, to secure premises or places in which to keep them, and to employ persons to do necessary clerical work, and to receive payments on subscriptions, and to incur reasonable expense in giving the public notices provided for.

The Act contemplates that there are persons who "desire to become shareholders," and that reasonable facilities for accomplishing that desire are all that is needed to enable the provisional directors to establish the bank.

In the absence of any authority to solicit or to canvass for subscriptions at the expense of the bank, I think it is impossible to say that an authority to impose upon the bank, without the consent of the subscribers, a liability of \$10 or more per share can be implied, or, in the language of Lord Selborne, "brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it."

Then it appears to me that another difficulty in the appellants' way is that, though what was done is not expressly prohibited, it is so contrary to the express and unreserved authority conferred upon the shareholders' directors as to be impliedly prohibited or excluded from the powers of the provisional directors.

In other words, it seems to me that, having regard to sec. 19 and subsequent provisions of the Act, and the express powers conferred upon provisional directors, secs. 12 and 13 are not merely declaratory of some of their powers and duties, as urged by Mr. Morine, but those sections, read in the light of the objects of the Act and of the express powers specifically conferred on the shareholders' directors by sec. 19 and subsequent sections, clearly shew that all the powers intended to be conferred on provisional directors are contained in those two sections (12 and 13), and, if larger powers are to be exercised over funds contributed by subscribers, they must be acquired under contract with the subscribers.

There is nothing in the form of the contract signed by the subscribers which creates any charge upon the moneys or gives any right either to the bank or to the provisional directors to deduct any sum for commission.

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I think, if the provisional directors find it impossible to get the minimum amount subscribed except by hiring canvassers or paying commissions, it is their plain duty to pledge their own credit for this purpose, and submit the question of being reimbursed to the bank after its organisation is complete, instead of themselves, in the first place, without authority, appropriating the funds of the bank for that purpose.

But even the authority of the shareholders' directors to pay commissions for selling shares or obtaining subscriptions for stock under the Bank Act in its present form is, in my mind, open to grave doubt.

It is stated in Halsbury's Laws of England, vol. 5, p. 93, that prior to the English Companies Act, 1900, which, under certain conditions, authorised it, payment of underwriting commissions was illegal, on the authority of cases cited in note (r) on that page; and in Palmer's Company Precedents, 10th ed., p. 250, it is also stated that, prior to the coming into operation of the Act of 1900, it was extremely doubtful whether a company, even if authorised by its memorandum and articles of association, could legally pay out of its capital commission for underwriting shares in its own capital; but it is to be noticed, as against this, that in *Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 K.B. 604, it was held that a payment of 2½ per cent. brokerage for services in selling stock of the company was not illegal; but in that case the memorandum of association stated that it was one of the objects of the company to pay out of the funds of the association all brokerages, commissions, etc., for the issuing of the capital and in respect to the formation of the association, and it is also to be observed that the decision is strictly confined to the payment of brokerage to a broker at a rate of 2½ per cent.

It is not necessary, however, for me to decide as to the powers of shareholders' directors to pay or allow brokerage or commission on sale of bank stock.

The appellants endeavoured to justify the expenditures because a premium of \$25 was agreed to be paid on each share. Whether, if there had been enough premiums collected to meet all the expenditures of organisation, they would have been

entitled to have the commissions paid out of this fund, it is not important to consider, because, as stated above, the other expenditures allowed by the Referee more than exhausted all that was collected for premiums, so that the commissions could not be paid without impairing the capital.

Another argument urged for the appellants was that under the subscription contract the provisional directors were trustees of the money for the subscribers, and not for the bank, and therefore were not liable to the liquidator for breach of trust.

It is impossible to adopt that argument, in view of the contract itself, which was made with "the incorporators of the bank, with the bank itself, and with every other subscriber of the bank . . . to accept the shares applied for or any lesser number that may be allotted," and also in view of the fact that the shares subscribed for appear by the minutes kept by the appellants to have been allotted to the respective subscribers, and also in view of the fact that, while under the contract the moneys are at the disposal of the provisional directors, such moneys were received by them in the capacity of agents of the bank, and when received they held the same in trust not for the persons paying the same but for the corporation whose agents they were.

To adapt the language of Lord Selborne, in *Great Eastern R.W. Co. v. Turner* (1872), L.R. 8 Ch. 149, at p. 152, "The directors are the mere trustees or agents of the bank—trustees of the bank's money and property—agents in the transactions which they enter into on behalf of the bank."

The appellants are, therefore, liable to pay the liquidator all money which they paid or directed to be paid for commissions.

As to the appellant Perfect, I think that, with the exception of \$700, the evidence does not warrant a finding that he paid or directed to be paid any sum for commission. At most he was aware of payments being made by his co-directors; and, while there is a minute of a resolution moved by him on the 11th May, 1906, authorising such payments, he swears he was not a party to the resolution, and that the minute is not true; and there is no satisfactory evidence to discredit him. He also in-

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dorsed some cheques for the purpose of deposit to the credit of the provisional directors, but it does not appear that he paid or directed to be paid any money for commission except a cheque for \$700, which, with other provisional directors, he signed, and which on its face is said to be "on account of commissions."

I think *Young v. Naval Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K.B. 687, following *Cullerne v. London and Suburban, etc., Building Society* (1890), 25 Q.B.D. 485, and holding that a director was not personally liable for moneys unlawfully expended by his co-directors, excepting to the extent that he had signed cheques for that purpose, covers Perfect's case; and, therefore, the amount for which he is held liable jointly with the others will be reduced to \$700.

Subject to the question of the amount for which the appellants Kerr and Mackenzie are liable, and which may be spoken to before me again, if not settled, the appeal of all the appellants except Perfect will be dismissed with costs, and as to him the judgment appealed from will be varied by reducing his liability to \$700, with no costs of the appeal.

[Leave to appeal to the Court of Appeal was granted by TEETZEL, J., on the 9th February, 1911: see 2 O.W.N. 738.]

[DIVISIONAL COURT.]

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Trusts and Trustees—Assignee for Benefit of Creditors—Sale of Estate of Insolvent—Purchase by Agents and Trustees for Assignee—Finding of Fact—Evidence—Appeal—Fraud—Account—Profits on Resale—Sale of Portion of Property—Remedy—Actual Value of Property—Parties—Costs—Depositions of Deceased Defendant—Admissibility—Examination of Witness de Bene Esse—Refusal to Read at Trial.

In an action by a creditor of H. against C., the assignee of H. for the benefit of creditors, and two persons to whom C. had purported to sell lands forming part of the estate of H., for an account of profits and for damages, etc:—

Held, upon the evidence (MEREDITH, C.J.C.P., *dubitante*), that the conclusion of the trial Judge that the other two defendants purchased as agents and trustees for C. was abundantly justified.

McG., one of the defendants, resold the house bought in his name, at a profit of \$320:—

Held, that the measure of liability in respect of this transaction was the \$320; interest, occupation rent, and improvements, etc., might be set off against each other. For this sum both C. and McG. were liable. Upon the evidence, it was in McG.'s hands when the action was begun, and his executors (he having died *pendente lite*) were answerable.

Only part of the parcel bought in the name of the third defendant had been resold; the sale was for \$200:—

Held, that, if none of the property had been disposed of, the plaintiff's remedy would have been to have it declared that the property still remained subject to the trust and to have an account upon that footing; or he might have had a resale ordered, taking the increased price realised, and holding the defendants to the purchase if no more was realised; but, as part had been sold, the defendant C. was chargeable with the actual value of the estate at the time it was conveyed to the third defendant; any change of circumstances arising from depreciation of the property while in C.'s hands should be borne by him rather than by the *cestuis que trust*.

Held, however, that the third defendant was not liable to account upon this head, for, although he had lent himself to a fraud, no profit had reached his hands. He was a necessary and proper party to the action, and should answer along with C. for the plaintiff's costs.

Held, also, that the trial Judge had properly refused to admit in evidence, on behalf of the executors of McG., his depositions upon his examination for discovery; and had properly refused to compel the plaintiff to read an examination *de bene esse* taken at his instance, which he did not desire to read; but the defendants should have the costs of this examination.

Judgment of LATCHFORD, J., varied.

AN appeal by the defendants from the judgment of LATCHFORD, J., of the 17th June, 1910, in favour of the plaintiff. The action was brought by a creditor of George P. Hughes against M. J. Casserley, assignee of Hughes for the benefit of his creditors, and against James Campbell and Thomas Q. McGoey; the plaintiff alleging a conspiracy with the intent and

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design of defeating, delaying, hindering, and defrauding the plaintiff and other creditors of Hughes, and asking that Campbell and McGoeys be ordered to account for the rents and profits of the insolvent's property conveyed to them by Casserley, and for damages for conspiracy and fraud against all the defendants, and for removal of Casserley from the office of assignee. At the trial judgment was given for the plaintiff, removing the defendant Casserley from his office of assignee, ordering him to pay \$2,345 damages for the conveyance of property of Hughes held to be in fraud of the plaintiff and other creditors, and, in default of payment by him, ordering the representatives of McGoeys (who had died) to pay \$820, and the defendant Campbell to pay \$1,525, with costs up to judgment, directing a reference to the Local Master at Barrie to take the accounts, etc., and reserving further directions and costs.

October 25 and 26. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., SUTHERLAND and MIDDLETON, JJ.

G. Lynch-Staunton, K.C., and *A. E. H. Creswicke*, K.C., for the defendant Casserley. There was not sufficient evidence to warrant a finding of fraud on the part of Casserley or any of the defendants, or to impeach any of the land transactions attacked. The plaintiff and the other creditors suffered no damage whatever. Casserley tried to get the best price for the property, and the purchase was a *bonâ fide* one. If the Court will not uphold the transaction, the proper remedy is a resale, but the Court cannot force the defendants to retain the property at a price which may now be found to have been the actual value at the time of the transactions complained of: *Hardwicke (Lord) v. Vernon* (1799), 4 Ves. 411; *Lewin's Law of Trusts*, 11th ed., p. 571; *Boswell v. Coaks* (1883), 23 Ch. D. 302, at p. 310; *Godefroi on Trusts and Trustees*, 3rd ed., p. 415; *Campbell v. Walker* (1800), 5 Ves. 678; *Ex p. Bennett* (1805), 10 Ves. 380. The plaintiff is estopped by his delay from bringing this action.

D. L. McCarthy, K.C., for the defendant Campbell and the executors of McGoeys. McGoeys was not in any conspiracy with

Casserley in connection with the purchase of the property. I should have been allowed at the trial to read the depositions of McGoeys made on his examination for discovery, under Con. Rule 486. There should be no judgment against Campbell. He made no profit out of the transactions.

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G. H. Watson, K.C., and *J. Fraser*, for the plaintiff. The trial Judge's finding of fraud on the part of the defendants is amply justified by the evidence, and should not be disturbed. The evidence shews a conversion. It shews that McGoeys and Campbell purchased as agents or trustees for Casserley. As to the measure of damages, the rule is laid down in *Lewin's Law of Trusts*, 11th ed., p. 573. See also *Hardwicke (Lord) v. Vernon*, 4 Ves. 411; *S.C.* (1808), 14 Ves. 504; *Eden v. Ridsdales Railway Lamp and Lighting Co.* (1889), 23 Q.B.D. 368; *Thompson v. Clarkson* (1891), 21 O.R. 421. Atkinson is not estopped by his delay: *Morrison v. Watts* (1892), 19 A.R. 622. *Bell v. Turner* (1876), 2 Ch. D. 409, and *Harsant v. Blaine* (1887), 56 L.J.N.S.Q.B. 511, were also referred to.

Lynch-Staunton, in reply.

December 23. MIDDLETON, J.:—The case of the appellants was argued with much ability by their counsel. Yet at the close of their argument it seemed to me that the judgment of my brother Latchford upon the facts remained unshaken. A perusal and consideration of the evidence has confirmed this view. This task has been rendered most labourious by the necessity of keeping in mind the fact that the evidence, consisting of extracts from the examinations of the different defendants, was only admissible against each deponent, and certain other evidence, *e.g.*, the statement made by Casserley to Jeffcott, was only admissible against Casserley.

Upon the evidence as a whole, the conclusion that McGoeys and Campbell purchased as agents and trustees for Casserley is abundantly justified. Clearly the finding of the learned Judge upon the evidence cannot be reversed.

The legal effect of this finding, in the circumstances shewn, was not discussed at the trial—and we find ourselves unable to agree with the result in all respects.

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McGoey after the purchase, resold to Wright the house bought in his name, and a small parcel bought, it is said, from Campbell for \$200, for \$1,600, a sum which we accept as the real value. Upon the findings this was really a sale by Casserley. The \$200 may be taken fairly to represent the value of the additional parcel, so that the profit on this transaction was the difference between the original price, \$1,080, and \$1,400=\$320.

The measure of liability in respect of this transaction would then be the amount of the profit on the resale, \$320: *Fox v. Mackreth* (1791), 2 W. & T. L.C. Eq. 709. Interest, occupation, rent, and improvements, etc., may be set off against each other.

We think that for this sum both Casserley and McGoey are liable. McGoey received this sum, and, knowing it was trust money was bound to see that it reached its proper destination; and, when he paid it to Casserley (if in fact he has yet paid it) in his personal capacity, he was guilty of wrong-doing. Upon the evidence, it was in his hands when the action was begun, and his executors are answerable.

With reference to the parcel bought in Campbell's name, the situation is more difficult. Part of this property has been sold for \$200—had none been disposed of, the plaintiff's remedy would have been to have it declared that the property still remained subject to the trust and to have an account upon that footing; or he might have had a resale ordered, taking the increased price realised, and holding the defendants to the purchase if no more was realised. The defendants are ready to submit to this, but contend that the Court cannot force them to retain the property at a price which may now be found to have been the actual value at the time of the transaction complained of—this being the remedy granted by the trial Judge.

Authority upon the question is extremely meagre.

Godefroi, 3rd ed., p. 416, says: "If the estate, or any part of it, has been resold to a purchaser without notice, the trustee is ordered to pay the value of the estate and the profit made by him on the resale with interest at four per cent." For this are cited *Hall v. Hallet* (1784), 1 Cox Eq. 134; *Ex p. Reynolds* (1800), 5 Ves. 707; *Randall v. Errington* (1805), 10 Ves. 423; and *Armstrong v. Armstrong* (1880), 7 L.R. Ir. 207.

Lewin, 11th ed., p. 573, does not mention the case where part only has been sold, but gives as alternative remedies the right to compel the trustee to account for the difference in price or "the difference between the sum the trustee paid and the real value of the estate at the time of the purchase," citing for this *Hardwicke (Lord) v. Vernon*, 4 Ves. 411. Of these cases the only one which deals with the question is *Hardwicke (Lord) v. Vernon*, where Lord Chancellor Loughborough said that "the plain rule of justice is that he should be charged with the actual value of the estate."

It may be that this measure of relief bears hardly upon the trustee, but it must be kept in mind that he is the wrong-doer. The sale of a portion of the property, which prevents restitution, is his act; and, inasmuch as it was his duty to have sold, any change of circumstances arising from depreciation of the property while in his hands ought to be borne by him rather than by the *cestuis que trust*.

The exact amount to be charged against the defendant has given much anxiety. The sum of \$3,125 is probably more than would have been realised at an honest sale, but we cannot, on the evidence, reduce the "actual value" below that sum.

If the result is in one sense hard upon the defendant Casserley, it may serve to warn those occupying a fiduciary position that any attempt to make secret gain by underhand dealing with the trust estate is fraught with danger.

We can see no reason upon which the judgment against Campbell can be upheld. True, he has lent himself to a fraud, but no profit has reached his hands. His position in this respect differs from that of McGoeys. He was a necessary and proper party to the action, and should answer along with Casserley for the plaintiff's costs.

The judgment should be varied as indicated. The plaintiff recovers against Casserley and the estate of McGoeys \$320, and against Casserley alone the further sum of \$1,525. So far as McGoeys's estate is concerned, having regard to the amount recovered, it should only be liable for half of the taxable costs of the action. Casserley and Campbell should be liable for the costs of the action.

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In view of the partial success of the appeal, and of the fact that the amount for which Casserley is held liable may be more than would have been realised at a forced sale, justice will probably be done by giving no costs of the appeal.

The plaintiff will have a lien upon the amount recovered for his costs.

We do not deal with the rights of the defendants as between themselves.

Upon the hearing we expressed our concurrence with the rulings of the trial Judge refusing to admit in evidence, on behalf of the executors of McGeoy, his depositions upon his examination for discovery; and refusing to compel the plaintiff to read an examination *de bene esse* taken at his instance and which he did not desire to read. We think it fair to give the costs of this examination to the defendants, as it should be regarded as an unsuccessful experiment on the part of the plaintiff for which he should pay. These costs will be set off *pro tanto*.

SUTHERLAND, J.:—I agree.

MEREDITH, C.J.:—I have had an opportunity of reading the reasons for judgment of my brother Middleton, in which my brother Sutherland concurs, and, while I should have been better satisfied with a finding of not proven, I am not prepared to dissent from the conclusion to which they have come on the facts, especially as it agrees with the view of the learned trial Judge, who saw the witnesses and had a better opportunity for judging as to their credibility than an appellate Court has.

While, doubtless, there were circumstances proved which cast grave suspicion upon the conduct of the appellant Casserley in connection with the sales to McGoey and Campbell, and pointed to the purchases which were ostensibly made by them being really his, his defence was seriously handicapped owing to the death of McGoey before the trial, and his inability to use as evidence the examination for discovery of McGoey, which, though tendered, was excluded, and properly so, by the trial Judge. It was unfortunate also that the appellant Casserley was not examined as a witness on his own behalf.

I cannot help thinking that the result which my brothers have reached may work injustice. It may be that the apparently suspicious circumstances that Casserley went into possession of the property purchased from McGoey, and into the occupation of part of the property purchased by Campbell—the post-office—and that he advanced part of the purchase-money to Campbell, are to be explained by the existence of a desire on the part of Casserley to effect sales of the properties for the benefit of the creditors which he might not otherwise have succeeded in making—an explanation which, if it had been made by Casserley in the witness-box, might have been the more readily believed in view of the admitted difficulty in finding purchasers for such properties and the fruitless effort that had been made to find them.

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Nuisance—Odour from Tobacco Factory—Interference with Enjoyment of Neighbouring Premises—Local Standard—Reasonable User—Remedy—Damages—Injunction—Stay—Opportunity to Abate Nuisance.

The plaintiff complained of the odours arising from the manufacture of tobacco on the defendants' premises as detrimental to his enjoyment of his own neighbouring premises:—

Held, upon the evidence, that, the odours caused material discomfort and annoyance and rendered the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowance for the local standard of the neighbourhood, and therefore constituted a nuisance.

The reasonableness of a defendant's user of his own premises does not affect the plaintiff's rights.

Held, also, that, as the comfort and enjoyment of the plaintiff's property was interfered with, he was entitled to an injunction; damages would not be an adequate remedy.

The operation of the injunction was stayed for six months to enable the defendants to abate the nuisance.

Review of the authorities.

Judgment of BOYD, C., varied.

AN appeal by the plaintiff from the judgment of BOYD, C., of the 18th May, 1910, dismissing the action, which was brought by a merchant of Windsor, charging the defendants with committing a nuisance. The plaintiff complained of noxious odours coming from the defendants' tobacco factory and interfering with the plaintiff's enjoyment of his premises in the vicinity of

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the factory. The plaintiff claimed an injunction in respect of these odours and other matters.

BOYD, C., dismissed the action in respect of the claim for an injunction without costs; but granted the plaintiff a reference as to damages, if he elected to take it.

October 24. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., SUTHERLAND and MIDDLETON, JJ.

J. H. Rodd, for the plaintiff. The plaintiff is entitled to an injunction against the defendants restraining them from committing the nuisance complained of, namely, allowing to be emitted from their tobacco factory odours which are damaging to the health of the plaintiff's employees, hurting the plaintiff's business, and rendering uncomfortable his premises. The granting of an injunction would not be oppressive on the defendants, as their lease has only two years longer to run: *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287. Damages in the present case are not possible of estimation: *McKenzie v. Kayler* (1905), 15 Man. L.R. 660; *Crump v. Lambert* (1867), L.R. 3 Eq. 409; *Benjamin v. Storr* (1874), L.R. 9 C.P. 400; *Drysdale v. Dugas* (1896), 26 S.C.R. 20; *Hathaway v. Doig* (1881), 6 A.R. 264, at p. 269. As to delay in complaining, there must be more than mere acquiescence to disentitle the plaintiff to a remedy: *Radenhurst v. Coate* (1857), 6 Gr. 139; *Flight v. Thomas* (1839), 10 A. & E. 590; *Heather v. Parndon* (1877), 37 L.T.R. 393.

A. H. Clarke, K.C., for the defendants. Under their lease the defendants were entitled to carry on a tobacco business, even if, in the carrying on, a nuisance was created. There is no evidence that the plaintiff lost a customer. Witnesses for the defendants testified that the odours did not sicken them. If any injury is caused at all, it is not serious enough to justify the granting of an injunction: *St. Helen's Smelting Co. v. Tipping* (1865), 11 H.L.C. 642; *Salvin v. North Brancepeth Coal Co.* (1874), L.R. 9 Ch. 705. The plaintiff is barred from relief by his acquiescence: *Heenan v. Dewar* (1870-1), 17 Gr. 638, 18 Gr. 438.

Rodd, in reply.

December 23. The judgment of the Court was delivered by MIDDLETON, J.:—Appeal from judgment of the Chancellor dismissing an action to restrain a nuisance.

The nuisance complained of is the odour arising from the manufacture of tobacco on the defendants' premises.

At the trial two other matters were complained of—dust arising from the alley and interference with certain shutters. The dust from the alley was described as “the important part of this action.”

Upon the hearing we expressed our agreement with the learned trial Judge in dismissing the action as to these two claims.

The odour from the tobacco arises chiefly from the processes of steaming, steeping, and stewing which it undergoes, and the boiling of sugar, licorice, and other ingredients with which it is mixed before it is reduced to “plug tobacco” ready for the market. These odours cannot be prevented if the manufacture is to go on, and, upon the evidence, the defendants appear to be doing their best to prevent injury to their neighbours.

Many witnesses were called for the plaintiff who describe the odour as a “most sickening smell,” “a very bad smell,” “very, very offensive,” and “very nauseating.” Some say that it produces vertigo and dizziness, others nausea and headache. Some do not find any evil result beyond that incident to the disagreeable nature of the odour.

The defendants produce a number of witnesses, many of whom say that the odour is “not unhealthy;” others say that it “does not affect” them; and one enthusiastic lover of the weed describes it as “just splendid.”

Upon the whole evidence, there can be no doubt that there is a strong odour that to many, if not most, is extremely disagreeable.

In *Fleming v. Hislop* (1886), 11 App. Cas. 686, the standard set by Knight Bruce, V.-C., in *Walter v. Selfe* (1851), 4 DeG. & S. 315, is accepted by the Lords. In the older case the defendant was a brickmaker. The smoke was complained of. The Vice-Chancellor says (p. 322): “Ought this inconvenience to be considered in fact as more than fanciful, more than one

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of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people? . . . As far as the human frame in an average state of health at least is concerned, mere insalubrity, mere unwholesomeness, may possibly . . . be out of the case. . . . A smell may be sickening though not in a medical sense. . . . A man's body may be in a state of chronic discomfort, still retaining its health. . . . The defendant's intended proceedings will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiffs' house."

In *Fleming v. Hislop*, 11 App. Cas. at p. 691, the Earl of Selborne states his view of the law thus: "What causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property, is to be restrained . . . although the evidence does not go to the length of proving that health is in danger." Lord Halsbury, at p. 697, states what is substantially the same thing: "What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction."

Now, it is to be borne in mind that an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances. This is shewn by the often-quoted passage in Lord Halsbury's judgment in *Colls v. Home and Colonial Stores Limited*, [1904] A.C. 179, at p. 185: "A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it is a nuisance which will give a right of action."

In *Rushmer v. Polsue and Alfieri Limited*, [1906] 1 Ch. 234, [1907] A.C. 121, this principle is applied to the case of a printing office established in a neighbourhood devoted to printing, next door to the plaintiff's residence, and which rendered sleep impossible. Cozens Hardy, L.J., [1906] 1 Ch. at p. 250, sums up the situation in a way that commended itself to the Lords. It was, he says, contended "that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it . . . But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to cause a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield, I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previous to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short . . . it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character."

This case, as is shewn by this extract, puts an end to the controversy upon the question whether the reasonableness of the defendants' user of their own premises affects the plaintiff's rights. Kekewich, J., in *Reinhardt v. Mentasti* (1889), 42 Ch. D. 685, carefully reviews the cases and concludes that it does not. Buckley, J., in *Sanders-Clark v. Grosvenor Mansions Co.*, [1900] 2 Ch. 373, declined to accept this view, apparently confusing the question of nuisance having regard to the local standard with reasonable use of the defendants' premises.

In *Attorney-General v. Cole & Son*, [1901] 1 Ch. 205, Kekewich, J., discusses the apparent conflict and seeks to reconcile the two views.

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In *Drysdale v. Dugas*, 26 S.C.R. 20, the majority of the Supreme Court review the earlier cases, and come to the same conclusion as that now accepted in England.

It is plain, in this case, that the defendants' manufactory does constitute a nuisance. The odours do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood.

The remaining question is: must an injunction follow?

Both parties are tenants. Since the argument, it is said, the plaintiff has purchased the reversion in the defendants' property. Upon the application to admit this evidence, counsel said that, in their view, this made no difference in the legal rights of the parties.

The fact that the defendants are tenants cannot give them any greater right to commit a nuisance, and may be at once dismissed from consideration.

Nuisances fall into two classes, those which interfere with the comfort and enjoyment of the property, and those which interfere with the value of the property. The occupant may sue in respect of the former.

In such suit an injunction may well be awarded, as damages cannot be an adequate remedy: *Jones v. Chappell* (1875), L.R. 20 Eq. 539.

The working rule, stated by A. L. Smith, L.J., in *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, at p. 322, as defining the cases in which damages may be given in lieu of an injunction, shews that here an injunction is the proper remedy. No one should be called upon to submit to the inconvenience and annoyance arising from a noxious and sickening odour for a "small money payment," and the inconvenience and annoyance cannot be adequately "estimated in money." The cases in which damages can be substituted for an injunction sought to abate a nuisance of the first class must be exceedingly rare.

The injunction should, therefore, go, restraining the defendants from so operating their works as to cause a nuisance to the plaintiff by reason of the offensive odours arising from the

manufacture of tobacco: the operation of this injunction to be stayed for six months to allow the defendants to abate the nuisance if they can do so, or to make arrangements for the removal of that part of the business causing the odour.

As success is divided, there should be no costs of the action. The plaintiffs should have the costs of the appeal.

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ALLEN MANUFACTURING CO. v. MURPHY.

Covenant—Restraint of Trade—Agreement by Servant not to Engage in Business of a Similar Kind to that of Master—Engaging in one of two Departments of Business—Breach of Covenant—Restriction Extending to the Whole of Canada—Validity—Interests and Requirements of Business—Knowledge of Trade Secrets—Public Policy—Freedom of Contract.

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The plaintiffs carried on a compound business: (1) the manufacturing of white-wear and the laundering of it; (2) a general or custom laundry business. The defendant, who had been employed in the laundry department of the plaintiffs' business, and had learned their methods and secret processes, left their employment in June, 1910, and began to carry on a rival custom laundry business. By a restrictive clause contained in an agreement between the plaintiffs and defendant, made in 1904, the defendant, for good consideration, had become bound, for three years after leaving the employment of the plaintiffs, that he would be "neither directly nor indirectly interested or employed in any way by himself or with by or through any other person in any business of a similar kind to that carried on by the plaintiffs within the limits of the Dominion of Canada:"—

Held, that the defendant was carrying on "business of a similar kind" to that of the plaintiffs, even though the plaintiffs' laundry should be regarded as ancillary to their manufactory—all was the one business of compound and cognate nature, a material part of which the defendant was injuring.

Held, also, that the burden rested on the defendant to shew that the contract was invalid, in that the protection extended beyond what the plaintiffs' interests required, which is the modern test of validity; and, as the evidence shewed that the business of the plaintiffs as a whole extended over all parts of Canada, and as to the laundry branch extended over the greater part of Canada, the covenant not to engage in business "within the limits of the Dominion of Canada" was not too wide for the plaintiffs' protection, and its validity had not been successfully impeached—regard being had, moreover, to the trade secrets and improved methods of the plaintiffs communicated to the defendant.

Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.

Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535, *Printing and Numerical Registering Co. v. Sampson* (1875). L.R. 19 Eq. 462, 465, and *E. Underwood & Son Limited v. Barker*, [1899] 1 Ch. 300, followed.

Henry Leatham & Sons Limited v. Johnstone-White, [1907] 1 Ch. 189, 322, distinguished.

Judgment of MULOCK, C.J. Ex.D., reversed.

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APPEAL by the plaintiffs from the judgment of MULOCK, C.J.Ex.D., dismissing the action, which was brought for an injunction and damages in respect of an alleged breach by the defendant of his contract or covenant not to engage, in Canada, in a business of a kind similar to that carried on by the plaintiffs, for three years after leaving their employment. The facts in regard to the business carried on by the plaintiffs, in which the defendant had been employed, and the business afterwards carried on by the defendant after he ceased to be employed by the plaintiffs, are fully stated in the judgment of BOYD, C.

December 16. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

H. M. Mowat, K.C., for the plaintiffs, argued that the judgment of the learned trial Judge could not be supported on the ground taken by him, that the business entered into by the defendant was no breach of his engagement not to enter "into any business of a similar kind" to that carried on by the plaintiffs.

[He was stopped at this point.]

I. F. Hellmuth, K.C., and *H. H. Shaver*, for the defendant, supported the judgment of the trial Judge, and argued that, at all events, the covenant was unenforceable as being too wide in its restrictions, as it covered the whole of Canada: *Baker v. Hedgcock* (1888), 39 Ch. D. 520, *per Chitty J.*, at p. 522, where he cites *Pickering v. Ilfracombe R.W. Co.* (1868), L.R. 3 C.P. 235, 250, and *Price v. Green* (1847), 16 M. & W. 346. He also referred to *Mills v. Dunham*, [1891] 1 Ch. 576, *per Chitty, J.*, at p. 580; *Sir W. C. Leng & Co. Limited v. Andrews*, [1909] 1 Ch. 763, 767; *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; *Morris and Co. v. Ryle* (1910), 26 Times L.R. 678; *Henry Leetham & Sons Limited v. Johnstone-White*, [1907] 1 Ch. 189, 322.

Mowat, in reply, referred to *Homer v. Ashford* (1825), 3 Bing. 322, 326; *Mumford v. Gething* (1859), 7 C.B.N.S. 305, *per Erle, C.J.*, at p. 319, cited with approval in *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630, at p. 656; *Lyddon and Co. v. Thomas* (1901), 111 L.T.J. 10;

Badische Anilin und Soda Fabrik v. Schott Segner & Co., [1892] 3 Ch. 447; *Rannie v. Irvine* (1844), 7 M. & G. 969; *Lamson Pneumatic Tube Co. v. Phillips* (1904), 91 L.T.R. 363, 368; *Kerr on Injunctions*, 4th ed., p. 384.

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December 23. *BOYD, C.*:—The plaintiffs' company was incorporated in 1902, and it was authorised to "manufacture and deal in apparel and pressed goods of all kinds, in the machinery, raw material, ingredients, utensils, and appurtenances necessary to such manufacture, and to carry on a general laundry business, and to manufacture and deal in the machinery, appurtenances, and ingredients pertaining thereto." This was a compound business, manufacturing white-wear and the laundering of it, and a general or custom laundry business. Laundering was common to both departments or branches of the one corporate business, in which were employed for the particular and the general laundering the same plant and machinery, the same premises, and the same employees at the headquarters in Toronto. The manufacturing part is not complete without the laundry for the finishing of the goods, and the laundry is, besides, a valuable adjunct for the utilisation of the special plant and machinery required for a large business. Both departments were extensive and profitable. Evidence was more specially directed to the extent of territory which supplied material for the custom laundry, and it appears that the company did business from the Pacific to the Atlantic Provinces of the Dominion, chiefly, I infer, along the line of the Canadian Pacific Railway. It is in evidence that in connection with the laundry work there are fifty or sixty agencies in different parts of Canada, from Ottawa in the east as far north as Prince Albert, Fort William, Port Arthur, along the main line of the Canadian Pacific Railway, and a great many others in Ontario. The company have the railway contract from Montreal to Vancouver (*i.e.*, the sleeping-cars) and the dining-car work from Toronto to Winnipeg. The washing of all custom work is done in Toronto, and the parcels of clothing and furnishings are collected at the various branches, with horses and waggons. In Quebec there is an agency at Hull, and also the work coming

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from the Canadian Pacific Railway in that Province. There is no agency for the laundry (in particular) in New Brunswick or Nova Scotia or Prince Edward Island or British Columbia, but goods for laundry are received from and sent to the Yukon. There is an agency for laundry in Saskatchewan, but the company appear to have agencies for the manufactory in all these eastern and western Provinces, and the head of the company says that their manufactured goods are delivered all over Canada from the Atlantic to the Pacific. There was at one time the prospect on the part of the plaintiffs of establishing a "chain of laundries right across the continent."

Thus there would appear to be an extensive and wide-spread business, which is able, by present railway facilities, to do profitable trade all over Canada, and its business generally appears to be on the increase. Lately, however, the defendant has commenced a rival business in the laundry line in the city of Toronto, and has seriously affected the business of the company and drawn off many of their largest customers. And the question is, whether this can be restrained under the restrictive clause contained in the agreement of the 21st February, 1904, by which the defendant, for good consideration, became bound, for three years after leaving the employment of the plaintiffs, that he would be "neither directly nor indirectly interested or employed in any way by himself or with by or through any other person in any business of a similar kind to that carried on by the plaintiffs within the limits of the Dominion of Canada."

The Chief Justice dismissed the case on the ground that the custom laundry business entered into by the defendant was no breach of his engagement not to enter into "any business of a similar kind" to that carried on by the plaintiffs. That is, the defendant, having been educated in the improved methods of business in the plaintiffs' laundry and intrusted with their secrets, is to be at liberty to cut into that very profitable part of their business by a competitive laundry in the same city. This appears to me to be a very easy method of evading a contract, which should be discountenanced by the Court. The defendant is invading one moiety of the business, and has entered

into serious competition with the plaintiffs by means of his former position in their laundry, and through confidential communications derived from his former employment. The very statement of the position should carry its own condemnation. I cannot read any exculpation in the defence, "My business encroaches only on half of your business, and the rest I do not disturb."

Nor is the relation between these parties barren of authority. The test whether the business is of a similar kind to that of the defendant is, whether it is sufficiently like it to compete with it seriously: *Drew v. Guy*, [1894] 3 Ch. 25. As put by Kekewich, J., in *Watts v. Smith* (1890), 62 L.T.R. 453, the covenant means that he should not go and do that which he had theretofore been doing when in the employment of the plaintiffs, *i.e.*, managing their laundry department. And this language, I think, applies even though the laundry conducted by the defendant be an entire business and not one department of a larger business. This defendant carries on the laundry trade, which is essentially the trade embraced in the words a "similar kind of business," even though the plaintiffs' laundry may be regarded as ancillary to their manufactory—all is the one business of compound and cognate nature, a material part of which the defendant has injured. See the converse case of *Buckle v. Fredericks* (1890), 44 Ch. D. 244.

The question raised on the pleadings and more earnestly argued by the defendant was that the covenant was unenforceable because too wide in its restrictions, covering the whole of Canada.

The modern cases, and especially *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, 556, throw a new light on the manner of dealing with the extent of the area of restriction. As said in that case: "Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy, rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas or narrowed by the municipal laws of any country. It is not surprising to note that our laws have also been ex-

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panded, and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live." So that now, having regard to the state of affairs at the date of the contract, its validity is to be settled by the consideration whether it exceeds what is necessary for the protection of the covenantee: *ib.* 548.

In *Moenich v. Fenestre* (1892), 61 L.J. Ch. 737, 741, the Court said: "We must have regard to the business of the plaintiff. But the plaintiff's business is one which extends from one end of the United Kingdom to the other. Therefore the restraint is not unreasonable, because it is necessary for the protection of the plaintiff's business." These words apply to the stretches of territory in which and from which the plaintiff drew his business. The contract there was by a clerk not to engage in any trade or business in the United Kingdom in connection with any kind of goods of continental manufacture dealt in by the plaintiff.

Now, the burden rests on the defendant to shew that the contract is invalid, and that it is plainly and obviously clear that the protection extended beyond what the plaintiffs' interests required. That is the expression used by Fry, J. in *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, at p. 565; and, following this case, Chitty J., held in *Badische Anilin und Soda Fabrik v. Schott Segner & Co.*, [1892] 3 Ch. 447, that, if the restriction is not greater than can possibly be required for the protection of the covenantee, it is not unreasonable.

In this case the business of the plaintiffs as a whole clearly extends over all parts of Canada; as to the laundry branch it extends over the greater part of Canada, and might reasonably have been expected to become coterminous with the manufacturing part of the business. It was likely that the plaintiffs' customers for laundering might come from the eastern maritime Provinces, as they did come from the Yukon, to the extreme west of the Dominion. That is not an unreasonable or an unrealisable proposition, considering the present facilities for intercommunication all over Canada.

There is an additional element in this contest which must not be disregarded. The company plaintiffs have made changes

for better working in the laundry machinery and plant that other laundries know nothing about; by means of expert workmen the machines are improved by various attachments which are in the nature of trade secrets. The defendant was employed in the laundry department (which he selected) in a confidential position, and was instructed in all the details of the business, and thus became cognisant of those improved methods applied and used by the company in the laundry department. It was his special business to look after and direct the laundry work, including the custom work, as well as the finishing of the manufactured goods, which were all put through the laundry processes in this one business. As to this I refer to *Leather Cloth Co. v. Lorsont* (1869), L.R. 9 Eq. 345, and *Haynes v. Doman*, [1899] 2 Ch. 13, 30.

"If," said Sir George Jessel, in *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462, 465, "there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice." Bearing this salutary rule in mind and weighing the sort of evidence given in this case, it appears to me that the defendant has failed to make a defence sufficient to relieve him from his engagement.

Among other pertinent cases bearing directly upon the present is *E. Underwood and Son Limited v. Barker*, [1899] 1 Ch. 300. Underwood carried on an extensive trade in buying and selling hay and straw in various parts of the United Kingdom, and a restriction upon the clerk and foreman for one year from engaging in the like business all over Great Britain and Ireland was enforced by injunction.

In *Rousillon v. Rousillon*, 14 Ch. D. 351, the first case in which an agreement unlimited as to space was upheld as valid, the restriction was held to cover the United Kingdom, though there was no evidence of any trading by the plaintiff in Wales or Ireland.

Lamson Pneumatic Tube Co. v. Phillips, 91 L.T.R. 363, is one of the latest cases where a world-wide contract was considered

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and its reasonableness upheld by a majority of the Court; and it, as well as other recent cases, indicates the liberal discretion exercised by the Judges in the construction of these contracts with a view to their enforcement as a matter of fair and honest dealing between master and servant or employer and employee.

Another case of world-wide covenant is *White v. Wilson* (1907), 23 Times L.R. 469, where the restriction was enforced against any employee who transferred his services to a competitor and so injured the business of his former master.

In *Dowden and Pook Limited v. Pook*, [1904] 1 K.B. 45, a covenant of world-wide scope in the case of a cider merchant and his manager was held unreasonably extensive, though it might have been good as to the United Kingdom.

The dictum of Farwell, L.J., in *Henry Leatham & Sons Limited v. Johnstone-White*, [1907] 1 Ch. 189, 322, 327, that a man whose business is a corn miller's business and who requires to protect that, cannot, if he has also a furniture business, require the covenantee who enters into his service as an employee in the corn business to enter into covenants restricting him from entering into competition with him in the furniture business also, because it is not required for the protection of the corn business in which the man is employed, however much it may be beneficial to the individual person, the owner both of the corn business and the furniture business—is not pertinent to the case in hand. There are two distinct and unconnected businesses in only one of which the clerk is employed. Here the whole business is connected by the laundry department, without which the manufacturing business would be incomplete: the business is one whole, though separable for convenience in the conduct of it. In the case put by Farwell, L.J., the covenant would be in gross as to the furniture business, and, not being necessary for the protection of the corn business, would be unreasonable.

The defendant left the business of the plaintiffs on the 2nd June, 1910, and he should be inhibited for three years from that date from violating his engagement complained of in the pleadings.

I understand the operation of the interim injunction was suspended on the undertaking to keep an account of profits.

These profits should be investigated by the Master and paid over to the plaintiffs, who are also entitled to their costs of action and appeal.

I agree with the learned Chief Justice that the original contract as to the restrictive clause remains in force, though there was a further arrangement as to increase of salary afterwards made.

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LATCHFORD, J.:—I agree.

MIDDLETON, J.:—The division of judicial opinion following Sir Edward Fry's decision in *Rousillon v. Rousillon*, 14 Ch. D. 351, came to an end only with the decision of the Lords in the *Nordenfelt* case, in 1894. The test to be applied in determining the validity of a covenant in restraint of trade is the reasonableness of its provisions in the interest of the covenantee. Manifestly no arbitrary rules can be laid down. Each case must depend upon its own circumstances. The character and nature of the business and the relation of the covenantor to the business must always be regarded.

Vaughan Williams, L.J., in *Lamson Pneumatic Tube Co. v. Phillips*, 91 L.T.R. 363, a case in many respects resembling that now under consideration, states the law with clearness (p. 368): "Whenever you have a contract which purports to be in restraint of trade and which is general, the presumption is that that is so in restraint of trade as to be against public policy, and cannot therefore be enforced. But if it is shewn either within the four corners of the contract itself, or by evidence of the circumstances existing at the time of the making of the contract, that the contract was reasonably necessary for the protection of the plaintiff company's business, then in my opinion the Judge must say on those facts . . . whether or not the restrictive covenant was reasonably necessary for the protection of the contractee." This rule is well qualified by the statement of the same Judge in *E. Underwood & Son Limited v. Barker*, [1899] 1 Ch. 300, at p. 312, where he points out that "one cannot leave out of consideration the interest of the public in freedom of trade and in the liberty of the covenantor to earn a livelihood in any lawful industry."

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Since the *Nordenfelt* case the words of Lord Macnaghten, [1894] A.C. 535, 565, are always quoted with approval: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

Along with this I would write large the words of Lindley, M.R., in *E. Underwood & Son Limited v. Barker* (p. 305): "If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is, *primâ facie* at all events, contrary to the interests of any and every country. . . . The public policy which allows a person who obtains employment, on certain terms understood and agreed to by him, to repudiate his contract conflicts with and must to avail the defendant prevail for some sufficient reason over the manifest public policy which, as a rule, holds him to his bargain."

What then are the facts surrounding the bargain in this case?

A. W. Allen carries on in Toronto a very large manufacturing business, making shirts, collars, cuffs, white-wear, and women's underclothing of all kinds. Before this is placed upon the market it must be laundered. He also has a laundry which is not only ancillary to the manufacturing business but has a large "custom trade," i.e., soiled clothing is collected from resi-

dences, hotels, etc., and is laundered and returned. The relative importance of these two branches is said to be about the same—the manufacturing is rather more than the laundry.

The company was incorporated in 1902; the agreement in question was made in 1904.

The laundry is situated in Toronto. It was contemplated that parcels should be collected elsewhere and returned to the customer. Branch offices have been established all over Ontario, and also at Hull (Quebec), Battlefield (Saskatchewan), and in a small way in the Yukon.

This suffices to shew that the laundry is not essentially local, and now draws business from a large area, and the parties might well have contemplated ultimately invading all Canada.

Besides this, the employment was not in one branch of the business only. The agreement relates to the whole. The services actually rendered were in the laundry branch; the infraction complained of is the setting up of a laundry business; but the covenant was with reference to the whole business, and this business extended over all Canada. From the standpoint of the plaintiffs it is not too wide for their protection.

The contention of the defendant, based upon *Henry Leetham & Sons Limited v. Johnstone-White*, [1907] 1 Ch. 189, 322, is not well founded. That was a covenant with a company in relation not only to its own business, but also with relation to other businesses, and was objectionable not only because wider than necessary for the purposes of the covenant, but as being in effect a covenant in gross.

There should, in my view, be judgment for the plaintiffs, with a reference as to damages and costs.

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Dec. 24.

Negligence—Sale of Air-gun to Minor—Injury to Person—Duty—Liability—Criminal Code, sec. 119—Unlawful Act—Verdict of Jury—Evidence—Judge's Direction to Jury.

The defendants sold an air-gun, without ammunition, to a boy of thirteen, who procured ammunition, and used the gun to shoot birds with; while he was engaged in that pastime in a city street, one of the bullets injured the plaintiff, who sued the defendants for damages for her injuries, alleging negligence. The trial Judge left it to the jury to find whether the defendants were negligent in intrusting the gun to the boy, telling them that the question which went to them was wholly one of negligence, and also telling them that, having regard to the provisions of sec. 119 of the Criminal Code, the selling of the gun to the boy might in itself be evidence of negligence. The jury found a general verdict in favour of the plaintiff, and assessed the damages at \$800:—

Held, that there was evidence for the jury that the plaintiff's injuries were caused by the defendants' negligence; and that there was no misdirection.

Dixon v. Bell (1816), 5 M. & S. 198, applied and followed.

Seemle, also, that the object of sec. 119 was to prevent such accidents as that which happened to the plaintiff; and the trial Judge was right in his view that, apart altogether from the question of negligence, as the gun was sold to the boy in contravention of the provisions of that enactment, the defendants were liable to answer in damages to the plaintiff, the unlawful act being the proximate cause of her injury.

Judgment of BRITTON, J., 20 O.L.R. 639, affirmed.

AN appeal by the defendants from the judgment of BRITTON, J., 20 O.L.R. 639, in favour of the plaintiff. The action was brought by a married woman against a business firm in Hamilton, for supplying an air-rifle to a boy of thirteen years of age. While he was using it in a public thoroughfare, the contents were discharged and lodged in the plaintiff's left eye, by which she has lost the sight of the eye. The jury found that the defendants were guilty of negligence, and assessed the damages at \$800; and BRITTON, J., gave judgment for the plaintiff for that sum with costs.

September 29. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

G. Lynch-Staunton, K.C., for the defendants. The defendants were not guilty of any negligence. The gun, in itself, being unloaded when delivered by the defendants to the boy, was not dangerous. The defendants did not supply the bullets.

Dixon v. Bell (1816), 5 M. & S. 198, differs from the present case, in that there the gun was loaded, and therefore dangerous. I rely strongly on *Chaddock v. Plummer* (1891), 14 L.R.A. O.S. 675 (Michigan). Section 119 of the Criminal Code, which makes the selling or giving of air-guns to a minor under the age of sixteen years an offence, is not evidence of negligence. The Dominion Parliament has no power to determine by legislation what is the law of negligence.

J. L. Counsell, for the plaintiff. The defendants were guilty of negligence in handing the gun to the boy: *Dixon v. Bell*, 5 M. & S. 198. They committed a breach of a statutory duty. Section 119 of the Criminal Code is evidence that the defendants should have anticipated just such an injury following the handing of such a weapon to a boy of thirteen years: *Williams v. Eady* (1893), 9 Times L.R. 637, 10 Times L.R. 41. The jury's finding of negligence is conclusive.

Lynch-Staunton, in reply.

December 24. MEREDITH, C.J.:—The appellants carry on a mercantile business in Hamilton and issue tickets or coupons to purchasers which are available as cash in the purchase of other goods. A boy named John O'Connor, thirteen years of age, having become possessed of twenty-five of these coupons, exchanged them at the appellants' place of business for an air-gun; he did not obtain from them any ammunition for the gun, but got it elsewhere; he used the gun to shoot birds with, and, while engaged in that pastime in a street of Hamilton, one of the bullets unfortunately struck the respondent's eye and so injured it that she has lost the sight of it.

The jury found a general verdict in favour of the respondent, and assessed the damages at \$800. The learned trial Judge left it to the jury to find whether the appellants were negligent in intrusting the gun to the boy, telling them that the question which went to them was wholly one of negligence, adding: "Whether there was negligence on the part of the defendants in handing out and intrusting to a boy of the age of Johnnie O'Connor a gun like that, so that, when loaded, harm could be done with it in the hands of the boy to whom it was intrusted.

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And you have to take into consideration, as I have said, the difference between O'Connor, a boy of intelligence and capable of reasoning, seeing the relation between cause and effect and knowing the necessity of taking care, and an animal without reason."

He also told the jury that, having regard to the provisions of the Criminal Code (sec. 119), making it an offence to sell or give any air-gun or ammunition for it to a minor under the age of sixteen years, unless it is shewn that the person charged used reasonable diligence to ascertain the age of the minor before doing it, and had good reason to believe that the minor was not under that age, the selling of the gun to the boy O'Connor might in itself be evidence of negligence; and to this part of the charge objection was taken by the appellants' counsel.

It appears from the report of the considered judgment of the learned Judge (1910), 20 O.L.R. 639, that he was of opinion that, apart altogether from the question of negligence, as the air-gun was sold to the boy in contravention of the provisions of the Code, the appellants were liable to answer in damages to the respondent for the injury which she sustained, the unlawful act being, in his opinion, the proximate cause of that injury.

The object of the provisions of the Code was undoubtedly, I think, the prevention of such accidents as that which happened to the respondent; and, that being the case, the view of the learned Judge is supported by the following statement of the law by an eminent commentator: "The commission of an act specifically forbidden by law . . . is generally equivalent to an act done with intent to cause injury where the harm that ensues from the unlawful act is the very kind of harm which it was the aim of the law to prevent:" Pollock on Torts, 8th ed., pp. 26-7.

But, however that may be, I am of opinion that there was evidence for the jury that the respondent's injuries were caused by the appellants' negligence; and that there was no misdirection.

In *Dixon v. Bell*, 5 M. & S. 198, referred to by my learned brother, the facts were that the defendant had a gun loaded with types in the house of a man named Leman, with whom he lodged, and sent his servant, a girl of thirteen or fourteen for it, de-

siring Leman to give it to her after taking out the priming. Having done this, Leman gave the gun to the girl, who put it down in the kitchen, resting on the butt, and soon after took it up again and presented it in play at the plaintiff's son and drew the trigger, when the gun went off owing to some grains of powder having been left in the touchhole, and some of the contents struck out his right eye and two of his teeth. An action was brought by the boy to recover damages for his injuries, and a rule to set aside the verdict he had obtained was discharged, the Court expressing the opinion that the defendant was negligent in merely directing that the priming should be taken out, instead of, as was incumbent on him, making the gun "safe and innoxious," which he might have done by the discharge or drawing of the contents.

It is plain that, if the latter course had been adopted, the decision would have been the other way; in other words, that, if the gun had not been loaded when it was given to the girl, the defendant would not have been chargeable with negligence.

If this is the case, why, it may be asked, should the appellants be chargeable with negligence? The air-gun which they sold to the boy O'Connor was as harmless when it was handed to him as was the unloaded gun when the girl was intrusted with it, and was no more potentially dangerous than it.

The answer to this question is, I think, that in the case of the girl, it was not contemplated that the gun was to be used by her, but only to be carried to the place to which she was directed to take it, while the air-gun was sold to the boy, as the jury might very properly infer, for the purpose of his using it as he afterwards did, and it was, I think, open to the jury to find that this constituted negligence on the part of the appellants. The air-gun, though in itself harmless when the boy received it, would become a dangerous instrument in his hands when he had obtained the bullets and loaded it with them, and that he would do this was in contemplation of the seller as well as of the boy.

I think, also, that the learned Judge was right in telling the jury, as in effect he did, that the fact that the danger to the public of an air-gun or ammunition being in the hands of a minor under the age of sixteen was deemed by the Legislature of so

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serious a character as to render it proper that it should be made a criminal offence to sell or give either the air-gun or ammunition for it to such a minor, was a factor they might take into account in determining whether the appellants were guilty of the negligence with which they were charged.

I do not see why this fact was not one to be taken into account in the same way as evidence for the purpose of proving that a piece of machinery is dangerous to those using or employed about it, and that the proper means to guard against that danger as far as it was practicable to do so had not been adopted.

If authority is needed for this proposition, it may be found in *Blamires v. Lancashire and Yorkshire R.W. Co.* (1873), L.R. 8 Ex. 283.

The appeal should, in my opinion, be dismissed with costs.

TEETZEL, J.:—I agree.

CLUTE, J.:—The plaintiff brings this action asking damages for the loss of her left eye, caused by a bullet discharged from an air-gun, by a lad thirteen years of age, who had obtained the gun from the defendants, in exchange for sale tickets.

The lad was in the street two days after the purchase of the gun, and fired at a bird. The plaintiff, standing in her door across the road, was hit, as the jury found, by the bullet thus discharged.

The plaintiff contends that there was a breach of sec. 119 of the Criminal Code in selling to a minor under sixteen years of age, and that there was negligence in permitting an infant to go forth with a weapon of that kind.

The shot used was bought by the lad at another store on his way to buy the rifle.

There was no objection to the charge. There was a general finding for the plaintiff and damages assessed at \$800.

The question then is, was there evidence for the jury? The sale of the air-gun was an unlawful act, contrary to sec. 119 of the Criminal Code.

It was a breach of duty without which the accident would not have occurred, and in this sense there was negligence in the sale of the air-gun to the boy.

Was the sale the causing cause of the accident, or was it too remote to be so regarded? The prohibition against selling an air-gun to an infant under sixteen years of age was, no doubt, to protect the child, and the public as well, from the danger which would arise from an instrument of that kind being placed in the hands of such a person. The sale of the instrument makes the danger possible, and in that sense the defendants have created a dangerous condition of affairs, which in effect resulted in the injury complained of. No doubt, all the circumstances of the particular case would have to be taken into consideration, as the trial Judge charged the jury. The prohibition must mean that, if a child of tender age had a gun, he would probably use it, and, if he used it, he would probably hurt either himself or somebody else. The defendants sent him out thus armed with a dangerous instrument, without instructions and without caution—if that would make any difference. The effect of the lapse of two days does not, it appears to me, make any difference. During all the time the infant had possession of the gun, that possession was unlawful, and made unlawful by the defendants. He was unlawfully possessed of it by their act; the natural result following—having become possessed of the weapon, he used it, and in using it caused the injury. His final act in the using is so connected with the prohibition that I do not think, in the circumstances of this case, it is so remote as to have entitled the defendants to have the case withdrawn from the jury.

I think the learned trial Judge was right in submitting the case to the jury, and that there was evidence to support the verdict.

The appeal should, in my opinion, be dismissed with costs.

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[IN CHAMBERS.]

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RE FARMERS BANK OF CANADA.

Dec. 27.

Bank—Petition for Winding-up—Winding-up Act, R.S.C. 1906, ch. 144, secs. 13(2), 14—Four Days' Notice—Waiver by Bank—Application of Rules of Practice—Power of Court to Shorten Time—Curator Appointed under Bank Act, secs. 119, 121—Right to Insist upon Statutory Notice—Power to Enlarge Hearing—Other Petitions Pending—Costs.

The provision of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 13 (2), that "four days' notice shall be given to the company before the making of" an application for a winding-up order, cannot be waived by the company; and, where the full four days' notice has not been given, a Judge has no power to make the order. The Consolidated Rules of Practice are not by any of the provisions of the Winding-up Act made applicable so as to authorise the Court to shorten the time.

Where a curator has been appointed for a bank under the Bank Act, R.S.C. 1906, ch. 29, he is by secs. 119 and 121, vested with all the powers which directors and solicitor had before his appointment; and, after the appointment of a curator, the board of directors have no power to give a solicitor authority to consent to a winding-up order or to anything which may have any effect upon the rights and interests of creditors; and a solicitor has no such authority derivable from his former retainer by the bank; and in this case the consent, admission and waiver of a solicitor, purporting to act on behalf of the bank, though made in good faith, after the appointment of the curator, had no validity.

An application for an order for the winding-up of a bank was refused, the curator objecting to the notice. The Judge might have adjourned the hearing under sec. 14 of the Winding-up Act; but, as there were other applications pending, he considered that the first applicant who was wholly regular should not be deprived of any advantage to which his adherence to the rules, statutes, and practice, entitled him.

The applicant was ordered to pay costs to the curator, who opposed the application, but not to creditors and others who appeared upon the hearing.

PETITION by George F. Reid for an order for the winding-up of the bank.

December 21 and 22. The petition was heard by RIDDELL, J., in Chambers.

Grayson Smith, for the petitioner.

W. H. Hunter, for the bank.

James Bicknell, K.C., for the curator.

December 27. RIDDELL, J.:—A petition was presented to me in Chambers on Wednesday the 21st instant, on behalf of George F. Reid for the winding-up of the Farmers Bank. Mr. Hunter appeared for the bank, and admitted insolvency; also, as I understood, waiving the four days' notice required by the Act. A

curator having been appointed under the Bank Act, R.S.C. 1906, ch. 29, sec. 117, I required notice to be served upon him of the application, and enlarged the motion till Thursday morning.

The curator appeared on the motion by counsel, and many other counsel appeared representing creditors, etc.

The curator repudiated Mr. Hunter's action *in toto*, and refused to make any admission of insolvency or to waive the statutory time of notice. The insolvency, however, is sufficiently proved by affidavit.

It is provided by the Winding-up Act, R.S.C. 1906, ch. 144, sec. 13(2): "Except in cases where such application is made by the company, four days' notice of the application shall be given to the company before the making of the same." The practice has not been uniform in our Courts upon the point whether the company can waive the statutory time—orders have been made to my knowledge where the company did so waive. I have had an opportunity of consulting a number of my brethren, and most hold the view that this statutory provision cannot be waived. I concur in that opinion. Nothing can be much stronger than the express provision that the four days' notice *shall* be given before the order is made.

And the reason of the matter assists—it is not only the company which is concerned—every creditor, every shareholder, may be affected by the order. It has been held that every creditor and every shareholder may appear as of right and not simply *ex gratiâ* as an *amicus curiæ* to oppose or support the motion: *Re McLean Stinson and Brodie Limited* (1910), 2 O.W.N. 294, and cases there cited; and that all who do appear are parties at least for some purposes: *S. C.* They may appear even though not served with notice; and it may well be that Parliament thought that such persons should have some days to consider their position—it might, indeed, be that they would not come to know of the petition, or notice of it, being served upon the company; but again, in these days of publicity, they might.

I do not think the Court has power to dispense with the time limited by the statute by reason of the provisions of the Con. Rules. Section 108 of the Winding-up Act refers only to proceedings; sec. 124, only after the winding-up order is made; sec.

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134 gives a majority of the Judges of the Court power to make and frame and settle the forms, rules and regulations to be followed in proceedings under the Act; and it may perhaps be that "regulations" is wide enough to cover time. But no such "regulations" have been made; and sec. 135 provides only that "the various forms and procedures"—not regulations—of the Court in other cases be followed.

I think that I have no power to make this order, the four days' notice required by the statute not having been given. Even had there been any power to waive the time, in the present case the result would be the same.

By the Bank Act, R.S.C. 1906, ch. 29, the powers of the curator are very large. Sections 119 and 121, in my opinion, vest him with all the powers which directors and solicitor had before his appointment. After the appointment of a curator, the board of directors have no power to give a solicitor authority to consent to anything which may have any effect upon the rights and interests of creditors—and, *â fortiori*, the solicitor has no such authority derivable from his former retainer by the bank. It is the curator who has all the powers and who shall take all steps and do all things necessary or expedient to protect the rights and interests of the creditors and shareholders of the bank; it is he who assumes and has supervision of the affairs of the bank; and no longer the directors or solicitor. The consent, admission, and waiver of Mr. Hunter, though of course made in good faith, had no more validity than those of the man in the street would have had.

The curator, who for the purpose of resisting a winding-up order is certainly vested with all the powers the bank itself would have had, may insist upon the statutory notice; he does insist; and the objection is fatal.

The motion must be refused with costs.

No doubt, I might have enlarged the hearing, etc., under sec. 14; it is said, however, that there are other petitions pending; and I think that, in the race for the order, with its casual advantages, the first applicant who is wholly regular should not be deprived of any advantage to which his rigid adherence to the rules, statutes, and practice, entitles him.

As to costs—while, as I have said, all creditors and shareholders have the right to appear upon the motion, they should do this at their own peril, unless they are served with notice of motion. There may be cases in which it would be proper to award these their costs against an applicant failing, but this is not one of such cases. The curator is alone entitled to his costs under this order.

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[DIVISIONAL COURT.]

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Oct. 6.

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Dec. 19.

Husband and Wife—Action for Declaration of Nullity of Marriage—Jurisdiction of High Court of Justice—Parties Related within Prohibited Degrees—7 Edw. VII. ch. 23, sec. 8—Absent Defendant—Service of Writ of Summons—Evidence—Want of Corroboration.

The High Court of Justice has no jurisdiction to declare a marriage invalid and void upon the ground that the parties are related within the prohibited degrees—as, in this case, that the husband is the brother of the wife's deceased husband.

The dictum of BOYD, C., in *Lawless v. Chamberlain* (1889), 18 O.R. 296, is obiter, and is not to be extended to such a case as this.

Hodgins v. McNeil (1862), 9 Gr. 305, approved.

Semble, that, when the Ontario Legislature, by 7 Edw. VII. ch. 23, sec. 8, assumed to confer jurisdiction upon the Court to declare that a valid marriage was not effected, in such a case as there specified, it went to the extreme limit, if it did not overstep its powers.

Judgment of LATCHFORD, J., dismissing the action, affirmed, upon grounds other than those stated by him.

Per LATCHFORD, J.:—Proper service upon the defendant of the writ of summons was not effected; and, the case being heard in his absence, the uncorroborated evidence of the plaintiff, who appeared to be an unreliable witness, did not justify a judgment declaring the marriage void.

THIS action was brought by the plaintiff against her husband, Robert May, for a judgment under sec. 57, sub-sec. 5, of the Judicature Act, declaring that the marriage of the parties at Toronto on the 1st July, 1893, was null and void.

At the date of the marriage attacked, the plaintiff was the widow of one William May, to whom she was married at Glasgow, Scotland, in 1870. She alleged that the defendant was a brother of her first husband, and that in procuring the license for the marriage at Toronto, the defendant made affidavit that the plaintiff was a spinster, and on these grounds she asked for a judgment declaring void her marriage to the defendant.

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May 16. The action was tried before LATCHFORD, J., without a jury, at Toronto.

E. Meek, K.C., for the plaintiff.

The defendant was not represented.

October 6. LATCHFORD, J.:—The opinion of my Lord the Chancellor in *Lawless v. Chamberlain* (1889), 18 O.R. 296, that the Court has jurisdiction to try a matrimonial case of this kind, and declare a marriage null, is, I think, binding on me; and the only question I am called upon to determine is whether the plaintiff has made out a case entitling her to the relief claimed.

The action is remarkable in many respects. It is undefended. The defendant was not personally served with the writ of summons or statement of claim. There is nothing, in fact, to indicate that he has any knowledge whatever of the proceedings taken against him by the plaintiff. He is described in the writ of summons as "of the city of Toronto." Two days after the issue of the writ, the plaintiff made an affidavit, with a view to obtaining an order for service of the writ substitutionally or by advertisement, that the defendant, at some unstated time subsequent to December, 1901, "left the city of Toronto, and I heard nothing from him until the month of September, 1908, when he came to the house where I was living. . . . I refused to recognise him in any way, and I have not since heard from him directly or indirectly. . . . The said Robert May after leaving me went to the city of Rochester, in the State of New York, as I am informed, and I have never heard of his living in any other place, or whether he is alive or dead." The plaintiff had lived with the defendant as his wife from 1893 until December, 1901.

The precise time when Robert May left Toronto—whether in the interval between December, 1901, and September, 1908, or after his abortive call upon the plaintiff—is not stated even approximately; nor is any explanation given of the statement indorsed on the writ, obviously by her instructions, that Robert May was, two days previous to the date of the jurat, a resident of Toronto. A second affidavit was made by the plaintiff that

her solicitor had written certain letters to the Chief of Police of Rochester, and had received a reply. She further deposed that she had "no knowledge whatever and no information as to the present whereabouts of the defendant Robert May."

Upon this material, which shewed clearly enough that the defendant was not resident in Toronto, an order was made that good and sufficient service of the writ on the defendant might be effected by the publication of the order for three successive weeks in the Saturday issue of the Toronto "*World*," beginning with the 25th December, 1909, and ending on the 8th January, 1910, and that the defendant should have until the 19th January, 1910, to enter an appearance to the writ. A subsequent order, rendered necessary by an omission to publish the advertisement on the 1st January, provided that the advertisement might be published on the 22nd January, and gave the defendant until the 8th February to appear.

There is not among the papers filed in support of the application for the order for service by advertisement the least suggestion that notice of the proceedings would thereby be likely to reach the defendant, if indeed he was then living. I have no hesitation in saying that the order for service by advertisement should not have been made.

The principle applicable in such cases is admirably stated by Mr. Justice Street in *Alexander v. Alexander* (1901), 1 O.L.R. 639, at p. 643: "A plaintiff should not be permitted to proceed as if personal service had been effected when it has not, without some substantial ground upon which it may reasonably be presumed that the defendant has received notice of the proceedings; for it is contrary to the first principles of justice that proceedings should be taken against him without giving him notice of them."

There are other grounds upon which I think the application should be held to fail. The only evidence that the defendant is the brother of the plaintiff's first husband is her own unsupported oath. Her source of information was not stated, nor her means of knowledge. Moreover, her statements upon oath are not to be relied on. In her affidavit of the 24th November, 1909, she stated that, when the defendant procured the marriage

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license, he "swore that I was a spinster." The license itself, which is in evidence, describes the plaintiff as a widow. I regard her as an unreliable witness, upon whose uncorroborated evidence a judgment declaring her marriage with the defendant void should not be given, even if proper service of the writ has been effected.

The action should be dismissed.

The plaintiff appealed from the judgment of Latchford, J.

December 19. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

E. Meek, K.C., for the appellant. The marriage between the appellant and the respondent should be declared invalid and void by the Court, because the respondent was a brother of the former husband of the appellant. Such a marriage is within the prohibited degrees, and so in the eye of the law a nullity: The Marriage Act, R.S.O. 1897, ch. 162, sec. 19, as amended by 2 Edw. VII. ch. 23, sec. 1, schedule F, 20; 5 & 6 Wm. IV. ch. 54, sec. 2; Russell on Crimes, 7th ed., pp. 995, 996. The Court has jurisdiction to make such a declaration. See sec. 57, sub-sec. 5, of the Judicature Act; *Lawless v. Chamberlain*, 18 O.R. 296; Encyc. of the Laws of England, vol. 9, p. 15; Poynter on Marriage and Divorce, 2nd ed. (1824), pp. 113 to 119 and p. 156.

No one appeared for the respondent.

At the close of the argument the judgment of the Court was delivered by MEREDITH, C.J.:—We think we must dismiss this appeal, without entering upon questions which were considered by the learned trial Judge and led to his dismissal of the action.

The ground upon which it is sought to obtain a judgment of the High Court declaring that the marriage between the appellant and the respondent was invalid and void is that the respondent was a brother of the former husband of the appellant.

No doubt, as Mr. Meek pointed out, a marriage with the respondent was within the prohibited degrees; and, although there has been remedial legislation with regard to marriage with a deceased wife's sister, there has been none so far as this bar is concerned.

Mr. Meek was unable to point to any case in which it has been decided that the Court has any such jurisdiction as it is asked to exercise. The furthest to which the Court has gone is the dictum of the Chancellor in the case of *Lawless v. Chamberlain*, 18 O.R. 296. There the grounds upon which it was sought to obtain a declaration that the marriage was invalid were that there had been in fact no consent on the part of the plaintiff, that she was a minor, that the marriage took place without the consent of her guardian, and that she was forced to go through the form of marriage with the defendant. The learned Chancellor dismissed the action upon the ground that the case alleged had not been made out upon the evidence; but he went into the question of the jurisdiction of the Court to entertain the action if the proof had been in accordance with the allegation in the pleadings, and came to the conclusion that, if the case alleged upon the pleadings had been made out, there was jurisdiction to make the declaration asked for.

Now, that is the furthest to which any case has gone, and I think it would be a very great misfortune if it should be held that a jurisdiction which, formerly at all events, was exercised in England only by the ecclesiastical Courts—a system which has not been introduced into this country—should be exercised by the High Court.

The language of Vice-Chancellor Esten in *Hodgins v. McNeil* (1862), 9 Gr. 305, which, according to my understanding, has always been accepted as correctly stating the law, is directly applicable to such a case as this. That was not the case of a marriage with a brother of the deceased husband, but of a marriage with a deceased wife's sister, and the Vice-Chancellor, after referring to the argument by Mr. Hodgins as to Lord Lyndhurst's Act being in force in this Province, and coming to the conclusion that it is not, says (p. 310): "Its only effect would be to shew that this marriage was unlawful and void, but, nevertheless, it must be recognised as a marriage *de facto* by the temporal Courts until annulled by sentence of the ecclesiastical Courts, which could only be done during the lifetime of both parties to it. But this is clearly the law of this Province. It cannot be doubted that the marriage in question in this case

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was unlawful and void at the time of its celebration, and could have been annulled by the sentence of the ecclesiastical Court at any time during the lifetime of both parties. But it is equally clear that, it never having been so annulled, it has become indissoluble, and the children springing from it are to all practical purposes absolutely legitimate."

I take this to mean that, in the view of the Vice-Chancellor, the marriage could only be annulled by the sentence of an ecclesiastical Court, and that it was not in the power of a temporal Court to annul it or to declare it to be an invalid marriage.

The only case in which the Legislature has assumed to recognise the jurisdiction of the Courts to make such a declaration as the appellant seeks is 7 Edw. VII. ch. 23, sec. 8, which amends the Marriage Act by adding to it a section numbered 31, by which provision is made that: "In case a form of marriage shall be gone through between two persons either of whom is under the age of 18 years, without the consent required by section 15 of this Act, the High Court of Justice shall have jurisdiction and power, notwithstanding that a license or certificate was granted and that the ceremony was performed by a person authorised by law to solemnise marriage, in an action brought by either party who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into."

The jurisdiction thus conferred on the High Court is restricted by the following provisions:—

(1) That the persons have not after the ceremony cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of 19 years.

(2) That nothing "shall affect the excepted cases mentioned in section 16 of this Act or apply where after the ceremony there has occurred that which if a valid marriage had taken place would have been a consummation of the marriage."

(3) "The High Court of Justice shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony."

And by the statute of 1909, 9 Edw. VII. ch. 62, it is further provided that no declaration or adjudication that a valid marriage was not effected or entered into shall be made or pronounced under the authority of section 31 upon consent of parties, admissions, or in default of appearance or of pleading or otherwise than after a trial; that the evidence shall be taken *vivâ voce* in open court; that the Court may of its own motion require both or either of the parties to be examined before the Court touching the matters in question in the action; that "no trial shall be had until after ten days' notice to the Attorney-General for Ontario;" and that the Attorney-General shall be at liberty to intervene and take part in the proceedings.

That is the only case in which the Legislature has assumed to confer jurisdiction upon the High Court to declare any marriage to be invalid; and it has been thought by some that in doing this the Legislature went to the extreme limit of, if it did not overstep, its jurisdiction.

Now, as I have said, there is nothing except the *obiter dictum* of the Chancellor in *Lawless v. Chamberlain* which appears to support the appellant's case. Great respect must, of course, be paid to any expression of opinion by the learned Chancellor, especially where made after a consideration of the cases; but there is nothing, as I understand it, in the judgment which would warrant the conclusion that he intended to extend it to such a case as this, though there are expressions which seem to indicate that he thought the jurisdiction was not confined to cases in which there had been no real consent to the marriage, but the person seeking relief had been a mere automaton forced or under duress, and had not really consented to the ceremony in which she was apparently taking part.

I certainly cannot take the responsibility of assuming to exercise in the name of the High Court such a jurisdiction as is asked to be exercised in this case. It will be time enough if and when the Legislature acts as it did act in 1907, in regard to the case dealt with by the legislation in that year, for the Courts to exercise such a jurisdiction. In my opinion, the appeal should be dismissed upon this ground, but without costs.

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[IN THE COURT OF APPEAL.]

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Dec 30.

Criminal Law—Justices' Conviction for Indictable Offence—Absence of Jurisdiction—Commitment to Central Prison—Habeas Corpus—Order Quashing Warrant of Commitment and Directing Further Detention—Criminal Code, sec. 1120—Meaning and Application of—"In Custody Charged with an Indictable Offence."

The defendant was brought before two Justices of the Peace and charged with issuing a false cheque. He pleaded "guilty," and they convicted him and imposed a sentence of imprisonment in the Central Prison at Toronto. The offence was an indictable one, and not one of those which two Justices are, under Part XVI. of the Criminal Code, authorised to dispose of. Being taken to the Central Prison, the defendant obtained writs of *habeas corpus* and *certiorari* in aid, and, on the papers being returned thereunder, moved for his discharge before CLUTE, J., who made an order quashing the warrant of commitment, but, instead of discharging the defendant from custody, ordered that he should be remanded to the place where he was convicted, and brought before the two Justices for a preliminary hearing on the charge:—

Held, that the defendant was, when in the Central Prison, "in custody charged with an indictable offence," within the meaning of sec. 1120 of the Criminal Code, R.S.C. 1906, ch. 146, now amended by 7 & 8 Edw. VII. ch. 18, sec. 14; and an appeal from the order of CLUTE, J., was dismissed. *Per* MEREDITH, J.A., that the order could not be supported under sec. 1120; but that, apart from that enactment, there was power to remand the defendant so that he might be dealt with according to law upon the charge originally made against him; that the proper order would be one discharging him out of his present custody and providing for his proper return to his former custody, so that the proceedings which were properly begun against him might be properly continued.

APPEAL by the defendant from an order of CLUTE, J., in Chambers.

The following statement of facts is taken from the judgment of MAGEE, J.A.:—

The appellant was apprehended on a charge of issuing a false cheque, and brought before two Justices of the Peace at Cochrane. He pleaded "guilty" before them, and they imposed a sentence of imprisonment in the Central Prison at Toronto. The offence was an indictable one, and was not one of those which two Justices are, under Part XVI. of the Criminal Code, authorised to dispose of. They should only have held a preliminary inquiry, and sent the accused to the gaol of the district to await trial unless bailed. Being taken to the Central Prison, he applied for and obtained writs of *habeas corpus* and *certiorari* in aid, and, on the papers being returned thereunder, moved for his discharge.

CLUTE, J., made an order quashing the warrant of commitment to the Central Prison, but, instead of discharging the appellant from custody, ordered that he be remanded back to Cochrane and brought before the two Justices for a preliminary hearing upon the charge. The learned Judge considered that the case came within sec. 1120 of the Criminal Code, 1906 (formerly sec. 752 of the Criminal Code, 1892), now amended by 7 & 8 Edw. VII. ch. 18, sec. 14. Section 1120, as amended, provides that "whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice, under whose warrant he is in custody, or any other judge or justice, to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice."

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November 21. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

A. R. Hassard, for the defendant, argued that CLUTE, J., had no power, after quashing the warrant of commitment, to remand the defendant to custody, and that sec. 1120 of the Code did not apply to such a case. He referred to the following cases: *The King v. Goldsberry* (1905), 11 Can. Crim. Cas. 159, 160, 161; *Rex v. Graf* (1909), 19 O.L.R. 238, 247; *Rex v. Morgan* (1901), 3 O.L.R. 356; *Regina v. Randolph* (1900), 32 O.R. 212. The *Graf* case is distinguishable from the case at bar, as in that case there was a valid conviction.

J. R. Cartwright, K.C., for the Crown, argued that the construction of the word "charged" in sec. 1120, contended for by the defendant, was too narrow, and, if such a view were to prevail, the section might as well be struck out of the Code. He referred to the discussion at p. 245 of the *Graf* case as covering the point at issue.

[MOSS, C.J.O., referred to *The King v. Blucher* (1903), 7 Can.

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Crim. Cas. 278, cited in Crankshaw's Criminal Code of Canada, 3rd ed., at p. 1105.]

December 30. MAGEE, J.A., (after setting out the facts as above):—The defendant appeals from the order of Mr. Justice Clute, and contends that he was not, when the order was made in custody charged with the offence, within the meaning of the section, but in custody under conviction for the offence.

As he would still be liable to arrest upon the charge, the practical benefit to him, if he were discharged, does not appear; but he claims to have some hopes that, on explanation, the Crown may not proceed further against him, and he is entitled to have his appeal disposed of.

In remanding the prisoner, Clute, J., agreed with and followed the decision of Riddell, J., in *Rex v. Graf*, 19 O.L.R. 238. Latchford, J., also, in *Rex v. Crozier*, 27th November, 1908, not reported, ordered further detention under sec. 1120. In *Regina v. Randolph*, 32 O.R. 212, where there was a conviction which Ferguson, J., considered bad (although on a ground not accepted by other decisions), he did not question his right to remand the prisoner, but said (p. 215): "In the circumstances of the case, I think I am not called upon to act, and I think I should not act, under the provisions of sec. 752."

In *Rex v. Morgan* (1901), 2 O.L.R. 413, a valid conviction was itself left with the keeper of the Central Prison as his authority for detention, instead of a warrant. Although it was contended that the Court could do nothing but discharge the prisoner, Street, J., acting under sec. 752, remanded him and directed a proper warrant to be lodged with the gaoler. On appeal to this Court, 3 O.L.R. 356, the applicability of sec. 752 does not seem to have been questioned, and the decision was affirmed; and Armour, C.J.O., said that the proper course was pursued.

In *Rex v. Graf*, 19 O.L.R. 238, the conviction as amended was valid, but the warrant of commitment was invalid; and Riddell, J., acted upon sec. 1120, and directed a proper warrant to be delivered, although it was argued that it applied to cases before conviction only.

In a British Columbia case, *The King v. Blucher*, 7 Can. Crim. Cas. 278, the conviction was, as here, by a magistrate who had not jurisdiction, and, on granting a writ of habeas corpus, Bole, Local Judge, was asked, under sec. 752, to make an order for further detention and a preliminary inquiry, but, without discussing his power to do so, he said he was not prepared to take the responsibility of deciding that in that case it would best further the ends of justice.

In a Quebec case, *The King v. Goldsberry*, 11 Can. Crim. Cas. 159, a *habeas corpus* had been issued, and sentence of whipping was suspended pending the proceedings. On an application to quash the writ, Larue, J., was asked also to order, under sec. 752, the infliction of the whipping, the time for which had gone by; but, though quashing the writ, he refused to direct the whipping, saying that in the section no mention is made of persons convicted or found guilty, and that he had been unable to find a case in which this sec. 752 had been interpreted as being capable of application after condemnation. Referring to the opinion to that effect in Mr. Tremear's work on the Criminal Code, he said: "The opinion of Tremear may be correct, but it is based on reasoning and not on the formal text. To authorise me to intervene in the manner asked it is requisite that the power should be clearly bestowed, and as I do not find it in the statutes I must confine myself to ordering that the writ of *habeas corpus*, and the order of suspension which preceded it, be quashed."

With the exception of that case, none has been cited in which the power to act under sec. 1120, as apart from the advisability of doing so in the particular circumstances, has been held by any Court not to exist because of a conviction having taken place.

The tendency of the legislation is to prevent the ends of justice being interfered with by reason of mistakes, and to ensure the substantial carrying out of the law; and, indeed, the furtherance of those ends is the express object of this section. There is no reason why a mistake in or after conviction for a crime should not be remedied as well as one before—indeed, rather the contrary. One would think that such a case as *Rex v. Morgan*

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or *Rex v. Graf* would be just such as the Legislature would endeavour to cover. If there is nothing in principle against it, are the words of this section wide enough to cover cases of conviction, or is there anything to indicate that they were not so intended? We gain little or no assistance from any of the words in the section other than the words "charged" and "accused," which are here challenged, although one's attention is drawn by the words "legality of his imprisonment" and "further detention of the person accused." But is a person any the less "charged with" an offence or "accused" of it, because the charge or accusation has been established?

I cannot do better than use the words of Governor Hill of New York in granting inter-state extradition of a criminal convicted who had escaped from another State, in *In re Hope* (1889), 10 N.Y. Supp. 28, 7 N.Y. Crim. R. 406. It was objected that the constitution of the United States authorised the extradition of only persons "charged" with a crime, and that the charge no longer existed but was merged in the conviction. The Governor in his decision said: "No narrow or strained construction should be placed upon the word 'charged,' as used in the constitution and in the Federal statute. It is broad enough to include all classes of persons duly accused of crime. A person can be said to be 'charged' with crime as well after his conviction as before. The conviction simply establishes the charge conclusively. An unsatisfied judgment of conviction still constitutes a 'charge' within the true intent and meaning of the constitution. An indictment or affidavit simply presents the charge, while a conviction proves it. To warrant extradition the statute requires an indictment or affidavit charging a crime, but if, in addition thereto, there is also presented a record of conviction, the case is not weakened but rather strengthened."

So in *People ex rel. McCoy v. Warden of the City Prison* (1885), 3 N.Y. Crim. R. 370, the Supreme Court of New York dismissed an appeal from refusal of discharge under *habeas corpus* from warrant of extradition of a burglar convicted in another State.

In *Drinkall v. Spiegel* (1896), 68 Conn. 441, 36 Atl. Repr. 830, 36 L.R.A. 485, the Supreme Court (68 Conn. at p.

447) said: "The expression 'charged with,' as applied to a crime, is sometimes used in a limited sense—intending the accusation of a crime which precedes a formal trial. In a fuller and more accurate sense, the expression includes also the responsibility for the crime."

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It is true that, in the interpretation, account must be taken of the objects of the enactment, and of other provisions in the public statutes, and hence the words might well be construed in relation to extradition as having a wider significance than under other circumstances. Thus in *People v. Bauman* (1885), 3 N.Y. Crim. R. 454, bail was refused to a convicted criminal under an enactment allowing bail as of right to "a prisoner who stands charged upon a criminal accusation with a bailable offence," and who is appealing as to *habeas corpus*, and the Court said: "The words 'charged' and 'accusation' imply that the person is alleged to be guilty, not proved or adjudged to be so." But in that case there was another enactment expressly providing for bail on appeal after conviction being discretionary with the Judge.

I have referred to these cases as shewing that there is nothing inherently excluding the idea of a proven charge from a charge or an accusation. There is no reason in this particular section why the narrow meaning should be taken rather than the "fuller and more accurate sense" referred to by the Supreme Court of Connecticut. The furtherance of the ends of justice, implied as well as expressed to be the object of the provision, calls for its application as much after as before conviction. The proceedings of *certiorari* and *habeas corpus*, in which the power is given, may arise at either stage, and the Legislature has given no indication of an intention to limit the words of a beneficial provision. I see no reason so to limit it.

If, then, the section applies after a valid conviction, is it, as here argued, less applicable after a wholly void conviction, made without jurisdiction, and when the prisoner is not absolved from being tried for his offence, and there is nothing in which the charge could be said to merge? The argument appears to be stronger against such a conclusion.

The section uses the words "further detention," but that

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does not necessarily mean detention in the same place, but detention in the custody of the law.

The order appealed from might have been drawn up with more particularity; but it is a substantial compliance with the statute and with the learned Judge's direction.

I would dismiss the appeal.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A. :—The single question discussed, on the argument of this appeal, was whether sec. 1120 of the Criminal Code applies to this case.

It is admitted that the magistrates, under whose warrant the prisoner is detained in the Central Prison, had no power to try the case—that they had power only to make a preliminary inquiry and commit for trial, or discharge, the prisoner—and, therefore, that the prisoner's detention there is illegal

The section in question authorised the Judge who made the order in question to make it if the prisoner were a "person in custody charged with an indictable offence."

That the prisoner was not such a person, within the literal meaning of those words, is obvious; he was a person who had been in fact convicted of an indictable offence and was undergoing imprisonment imposed for such offence, upon such conviction, and was in no sense in custody charged with any offence; he could not be detained, as he was, in the Central Prison, if he were: it can make no difference that the trial, conviction, and sentence were legally invalid; the detention on the warrant to apprehend had come to an end—the prisoner had passed out of that.

The words "*in custody*" are important; they mean in this case, in the Central Prison, where, as I have said, no person merely accused of, or charged with, a crime can be imprisoned.

In a subsequent part of the section the person in custody is referred to as the "person accused," which strengthens the view that the section does not apply to a person in custody convicted of an indictable offence—validly or invalidly—as the prisoner was.

The section expressly applies to proceedings on "*certiorari*, *habeas corpus* or otherwise," but that does not necessarily enlarge the meaning of the words "charged" and "accused," because *certiorari* may go in cases other than convictions, as, of course, *habeas corpus* may; and "otherwise" comprises only things of the same nature.

I prefer the Quebec decision to a contrary one said to have been made in this Province, and there ought to be uniformity of practice in all the Provinces, to which alike the enactment is applicable. The cases of *Rex v. Morgan*, 2 O.L.R. 413, and 3 O.L.R. 356, and *Rex v. Graf*, 19 O.L.R. 238, are not in point; in each there was a valid conviction, and all that was lacking was a regular warrant of commitment, which might, quite irrespective of sec. 1120, have been put in before the discharge of the prisoner. It is quite true that in the latter case Riddell, J., purported to act under sec. 1120, but that did not deprive his action of any validity it may have had irrespective of that section.

I am, therefore, of opinion that the order in appeal cannot be supported under sec. 1120 of the Criminal Code.

If Parliament wishes the enactment to apply to persons in custody under any criminal proceeding, whether accused, convicted, or otherwise, it knows how to say so.

I would allow the appeal, and discharge the prisoner, if that were the only point in this case. That would not prevent his apprehension again and proper trial in due course upon the charge which was first made against him.

But I am glad that the other members of the Court have now been able to reach a different conclusion, and sorry that I am unable to agree with them in it; glad because it accords with that which the law ought to be.

It is not, however, what the law ought to be, but only that which it is, that can rightly be given effect. We cannot rightly give effect to that which Parliament ought to have said; we are restricted to that which it has said—the fair meaning of its words.

If the words to be interpreted were only "charged" and "accused," a different case would be presented for our con-

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sideration, but that is not so; the most controlling words are "*in custody charged* with an indictable offence;" and it seems to me that it would be an obvious misuse of the King's English so to describe one who is in custody upon a "conviction" of an indictable offence only, and in a prison in which no one "charged," but only those "convicted," and convicted of serious offences, could be held in custody. Beside that, the warden's return is that the prisoner is detained upon a "conviction," and for no other cause. And beside that, too, the words in question are used in an enactment—the Criminal Code—in which there is no confusion of the words "charged" and "convicted," and in no place is there any such abuse or misuse of the English language as describing a person in custody upon a conviction as in custody charged with an indictable offence. Throughout the Act, "charged with an offence," and "charged with an indictable offence," are used, but never as descriptive of a person convicted. One may be very well able to agree in all that has been decided in the Courts of the United States of America, and indeed in the opinions of political officers of such States, as to the meaning of the word "charged," as applied to inter-state extradition of criminals, under the "Constitution" of that country—it being hardly necessary to point out the wide difference between this case and such an one as that, in which a new prosecution must be begun, and so the person is necessarily accused and charged anew—and yet be very far from believing it to be possible that any one, much less the Parliament of Canada, would describe a convict, undergoing punishment in a penitentiary, to which no one sentenced to a less punishment than two years' imprisonment, at hard labour, can be sent, as an accused person, *in that custody*, charged with an indictable offence.

That the conviction is invalid can make no difference; the detention is under it, and under it only; there is no return of any detention on any other warrant; that upon the warrant to apprehend came to an end when the prisoner was rightly brought before the magistrate under it: all that was lawful and proper; error only came after that warrant had served its pur-

pose, and had entirely ceased to afford any just ground for the prisoner's detention; when the prisoner became rightly in the power of the magistrate, to remand, and to commit for trial, or discharge.

But the inapplicability of sec. 1120 is not conclusive of the case. Though the order in appeal was made under the provisions of that section of the Criminal Code only, and no attempt to support it here, otherwise, was made, that does not prevent a consideration of the question whether the order can be otherwise supported.

It is, in no sense, the purpose of any writ of *habeas corpus* to thwart the due administration of justice, and so, in many cases, even under the common law, one who is unduly restrained of his liberty, in one respect, and entitled to his discharge from such detention, may nevertheless be further detained, and dealt with, so that justice may be done regarding him.

In the case of *Ex p. Krans and Others* (1823), 1 B. & C. 258, there appearing to be sufficient ground for charging the applicants with having committed a felony, the Court made an order that they be committed to the custody of one of its marshalls, to be brought, at the first convenient opportunity, before some competent authority to be examined concerning the matters contained in the return to the writs, and to be further dealt with according to law; and in *In re Parker and Others* (1839), 5 M. & W. 32, it was held that, if the applicant could not be held under the restraint of which he complained, then any subject of the Crown of England could take and detain him in custody until he could be dealt with according to law upon the charge of treason, in respect of which crime he was in custody; and, accordingly, the prisoners were remanded; see also *Rex v. Marks* (1802), 3 East 157; and see also *In re Shuttleworth* (1846), 9 Q.B. 651, a case of a dangerous lunatic.

In cases in some of the United States of America, cases identical with this case in principle, it seems to have been held that there was power to remand; that, though the indictment under which the prisoner was retained was dead, yet it remained as a sworn accusation upon which the Court was warranted in remanding the prisoner to answer a new indictment: *In re Smith*

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C. A. (1879), 4 Colo. 532; and *Ex p. Ricord* (1876), 11 Nev. 287;
 1910 but, as neither the reports of these cases nor the statutes of the
 REX States in which they were decided are now accessible to me, I
 v. merely mention them: see also *Ex p. Badgley* (1827), 7 Cowen
 FREJD. (N.Y.) 472, and *Motherwell v. United States* (1901), 107 Fed.
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In the case of *Ex p. Besset* (1844), 6 Q.B. 481, it was held that there was no such power to remand, but that was a case of a person charged with having committed an offence in a foreign country and of proceedings under an enactment respecting such offences, the Court saying that neither they nor the gaoler had any authority but such as the statute gave; see, however, the observations of Brett, L.J., in the case of *The Queen v. Weil* (1882), 9 Q.B.D. 701, at p. 706, in favour of the right to arrest without a warrant for a felony in extradition cases.

My opinion is that, quite apart from the enactment in question, there was power to remand this prisoner, so that he might be dealt with according to law upon the charge originally made against him; but that the proper order should have been one discharging him out of his present custody and providing for his proper return to his former custody, so that the proceedings which were properly begun against him might be properly continued. He is detained in a penitentiary in Toronto; the proceedings against him must be continued at far-distant Cochrane: some judicial end should be put to that wrongful imprisonment, and some proper means of reconveying him and redelivering him into proper custody should be provided.

Having regard to the nature of the charge against him, as stated upon the argument here, and to the very considerable punishment the man has already undergone, I would have made an order for his discharge simply, leaving it to the prosecutor, or the Crown, if not yet satisfied, to take the usual steps for the apprehension and prosecution of the prisoner anew; but I do not dissent from the order now made, though less satisfied with it than if it were such as I have indicated.

Appeal dismissed.

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Assignments and Preferences—Chattel Mortgage—Assignment of Book-debts—Money Advanced to Insolvent Company to Pay one Creditor—Preference—Intent to Hinder and Delay—13 Eliz. ch. 5—Assignments and Preferences Act, sec. 2, sub-sec. 1—Book-debts Restored to Company—Laches—Subrogation to Rights of Creditor.

The defendant company, an incorporated trading company, being pressed for payment of debts by a bank and other creditors, the directors decided to raise money by chattel mortgage. The bank held as security for their advances to the company an assignment of the book-debts of the company, a bond for \$5,000 given by J., the secretary of the company personally, and the latter's indorsement of certain promissory notes discounted for the company. J.'s brother, the defendant A., who was employed by J., received from J. a cheque drawn by a third person in favour of A., for \$7,000, which A. indorsed and handed back to J., who deposited it to A.'s credit in the bank on the 3rd August, 1909. The money represented by this cheque was obtained by J. on his own note, without the knowledge of A. On the 12th August, 1909, the company made a chattel mortgage and assignment of book-debts in favour of A. for \$8,300, covering all their personal property. On the 13th August A. gave a cheque to the defendant company for \$8,300, which was deposited to the company's credit in the bank, and on the same day the company gave a cheque to the bank for \$2,254.50, being the full amount of the company's debt to the bank. On the 14th August there was a further deposit to the credit of A.'s account in the bank of \$1,000, of which a part was obtained from J. and the balance borrowed from another source. On the 7th September, 1909, the bank assigned to A. all their interest in the book-debts of the company, the assignment purporting to be in consideration of \$8,254.52 paid by A.:—*Held*, upon the evidence, that, at the time the chattel mortgage was given, the company were insolvent; that J. knew and A. knew or ought to have known of the insolvency; that the effect of the transaction was to give the bank a preference and indirectly to benefit J., who was security to the bank; and that it was done with this object in view.

Held, therefore, that the intent to delay, hinder, or defeat creditors was established, and that the case was brought within the Statute of Elizabeth and within sub-sec. 1 of sec. 2 of the Assignments and Preferences Act, R.S.O. 1897, ch. 147.

Review of the authorities.

Burns v. Wilson (1897), 28 S.C.R. 207, *Campbell v. Patterson, Mader v. McKinnon* (1892), 21 S.C.R. 645, and *Allan v. McLean* (1906), 8 O.W.R. 223, 761, followed.

After the mortgage, the company were allowed to collect the book-debts and to use the proceeds for their business:—

Held, that there was no advance specially in respect of the book-debts; the whole advance was one transaction; and A. was not entitled to stand in the shoes of the bank and be subrogated to their position in respect of the book-debts; but, if he were, he had lost his security by his own laches, and was not entitled to have his loss made good out of the proceeds of the chattels, to which he had no legal right as against the other creditors. Judgment of TEETZEL, J., varied.

ACTION to set aside a chattel mortgage and assignment of book-debts, in the circumstances mentioned below.

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June 23. The action was tried before TEETZEL, J., without a jury, at Berlin.

M. A. Secord, for the plaintiffs.

G. E. Gibbons, K.C., and *H. J. Sims*, for the defendant Uffelman.

W. M. Reade, K.C., for the defendant company.

TEETZEL, J.:—Action by the plaintiff, on behalf of himself and all other creditors of the defendant company, to set aside a chattel mortgage and assignment of book-debts made by the defendant company to the defendant Adam Uffelman, on the ground that they were made with intent to defeat, hinder, delay, or prejudice the creditors of the defendant company, within the meaning of sub-sec. 1 of sec. 2 of R.S.O. 1897, ch. 147.

In the statement of claim it is also charged that the chattel mortgage and assignment were made with intent to give the Merchants Bank of Canada and one Jacob Uffelman an unjust preference over the other creditors of the company, and were therefore void under sub-sec. 2 of sec. 2 of R.S.O. 1897, ch. 147; but, as neither the bank nor Jacob Uffelman is a party defendant, I think the disposition of the action must be confined to a consideration as to whether the transaction is impeachable under sub-sec. 1.

The chattel mortgage in question, which also contains an assignment of the company's book-debts, is dated the 12th August, 1909, and covers all the personal property of the defendant company. At that date the defendant company was indebted to the Merchants Bank in the sum of \$8,254.52, in respect of which Jacob Uffelman, brother of the defendant Adam Uffelman, who was also secretary-treasurer of the company, was liable to the bank under a bond as surety for the company, and as indorser of notes discounted by the company, to the extent of about \$7,700, and who was, therefore, a creditor of the company, within the meaning of sub-sec. 5 of sec. 2 of the Act. The bank also held an assignment of the company's book-debts as further collateral security for this claim.

For some time before the chattel mortgage was executed,

the company had been pressed by its creditors, some of whom had threatened and others had started actions, and the company was unable to meet its liabilities as they matured; and I find as a fact that, at the date of the chattel mortgage, the company was in insolvent circumstances, within the meaning of sec. 2 of the Act in question.

I also find as a fact that, when the chattel mortgage was executed, the company, through its officers, Otto Herold, vice-president, and Jacob Uffelman, secretary-treasurer, knew that the company was insolvent, and that the company, through the said officers, when they executed the chattel mortgage in the name of the company, intended thereby to defeat, hinder, delay, or prejudice all the creditors of the company except the Merchants Bank and Jacob Uffelman; and further, that it was the intention of the company, through the said officers, to defeat the objects of the said Act by raising the money advanced under the chattel mortgage to pay the claim of the Merchants Bank, and by paying the same to give an unjust preference to the bank and Jacob Uffelman, as surety, over their other creditors, to the extent that at that time the bank and Jacob Uffelman were not already protected by the assignment of book-accounts held by the bank.

I also find as a fact that the \$8,300 advanced to the company in the name of Adam Uffelman was raised upon the credit of Jacob Uffelman and placed in the hands of Adam Uffelman to make the advance, and that Adam, in taking the mortgage in his own name, was allowing himself to be used by Jacob Uffelman as an instrument to do what, under the law, Jacob Uffelman could not successfully have done in his own name.

I also find as a fact that the defendant Adam Uffelman, if he did not actually know, ought, under the circumstances which were known to him, to have known that the company was insolvent, and that it was the intention of the company and of his brother, in raising the money under the chattel mortgage, to effect an unjust preference over the company's creditors other than his brother and the bank.

That the transaction was really the affair of Jacob Uffelman is shewn by the following extract from Adam Uffelman's examination for discovery put in at the trial:—

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"526. So that, reducing this matter to a few words, so far as the procuring of the chattel mortgage was concerned, the carrying out of it and arranging for the money and everything, you had really nothing to do with it? A. Very little.

"527. You had your brother act for you in the whole matter? A. Yes.

"528. He had guided and protected you? A. Yes.

"529. And he arranged everything for you? A. Yes."

The money advanced by Adam Uffelman was only nominally his money. All but \$200, which was furnished by Jacob out of his own funds, was raised on Jacob's credit, so that it was really Jacob's own money, which he could not himself lend to the company to satisfy his own claim without the transaction being void under sub-sec. 2 of sec. 2.

Immediately after Adam Uffelman handed the cheque for \$8,300 to Jacob or to Herold, the vice-president, it was deposited to the company's credit, and the company's cheque was at once issued for \$8,254.52 to the bank in payment of its claim. This occurred on the 13th August, 1909.

I do not think, under all the circumstances, that the money could be said to have been given to the company in good faith, as the chief intent and object of the transaction was, so far as concerned the company and Jacob Uffelman, to secure the payment in full of the bank's claim, and, therefore, to relieve Jacob Uffelman from liability, the necessary consequence of which was and was known by them to be that all the other creditors were to be hindered and delayed, if not defeated, in their remedies.

It was part of the transaction that the bank should transfer to Adam Uffelman the book-accounts which they held under assignment from the company, and which they subsequently assigned to him; and, while I think the facts above found bring the case within the principle of *Burns v. Wilson* (1897), 28 S.C.R. 207, and *Allan v. McLean* (1906), 8 O.W.R. 223 and 761, I think the transaction can only be impeached to the extent of the difference between the actual value of the book-debts held by the bank on the 13th August, 1909, and \$8,300, because it was in fact only to the extent of that difference that either the

bank or Jacob Uffelman, as surety, could be said to be unjustly preferred, and, therefore, to that extent only could the advance be said to have been *malâ fide* for the purpose of avoiding the statute. It appeared from the evidence that, after the mortgage, the company was allowed to collect the book-accounts and to use the proceeds for the purposes of its business, and that only a small amount remains uncollected.

There was nothing to shew that this was done in bad faith, and I can find no reason why the defendant Uffelman should be deprived of the security to the extent of the value of the book-accounts which at the time of the transaction were held as security for part of the claim which was satisfied by the advance.

The judgment will, therefore, declare the chattel mortgage void as against the plaintiff and other creditors of the company to the extent of the difference between the actual value of the book-accounts on the 13th August, 1909, and \$8,300.

If the parties cannot agree upon this difference, it will be ascertained by the Master at Berlin. In other respects the judgment will be in the usual form in cases of this nature, with a reference to the Master at Berlin.

Costs of action and of reference to be paid by the defendants.

The plaintiff and the defendant Adam Uffelman both appealed from the judgment of TEETZEL, J.

November 9 and 10. The appeals were heard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

M. A. Secord, K.C., for the plaintiffs. The chattel mortgage should be set aside in its entirety, as it is void *in toto*. The \$8,300 advanced to the company was raised by Jacob Uffelman, Adam Uffelman being only a catspaw. Adam knew that the company was insolvent, and that raising the money under chattel mortgage was to accomplish an unjust preference over the company's creditors other than Jacob Uffelman and the bank. The consequence was the hindering and delaying of these other creditors, contrary to the provisions of sec. 2, sub-sec. 1,

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of R.S.O. 1897, ch. 147. I refer to *Hope v. Grant* (1891), 20 O.R. 623; *Burns v. Wilson*, 28 S.C.R. 207; *Campbell v. Patterson*, *Mader v. McKinnon* (1892), 21 S.C.R. 645; *Commercial Bank v. Wilson* (1866), 3 E. & A. 257; *Campbell v. Roche*, *McKinnon v. Roche* (1891), 18 A.R. 646; *Allan v. McLean*, 8 O.W.R. 223, 761. There was no actual *bonâ fide* advance of money to the company here, as the object of the transaction was to relieve Jacob Uffelman from his liability to the bank: *Stoddart v. Wilson* (1888), 16 O.R. 17; *Cyc.*, vol. 20, p. 638; *Cameron v. Perrin* (1887), 14 A.R. 565.

G. C. Gibbons, K.C., for the defendant Uffelman. The chattel mortgage was not invalid. There is no question of preference, because the Merchants Bank and Jacob Uffelman, those who are said to have benefited, are not parties to the action. The transaction is not void as against creditors on the ground that it was made with intent to defeat, hinder, and delay creditors, because there was an actual *bonâ fide* advance in money, and the fact that one creditor is preferred is no defence either against the Statute of Elizabeth or R.S.O. 1897, ch. 147, sec. 2, sub-sec. 1. I refer to *In re Johnson*, *Golden v. Gillam* (1881), 20 Ch. D. 389; *Freeman v. Pope* (1870), L.R. 5 Ch. 538; *Middleton v. Pollock*, *Ex p. Elliott* (1876), 2 Ch. D. 104; *Ex p. Games*, *In re Bamford* (1879), 12 Ch. D. 314; *Ex p. Stubbins*, *In re Wilkinson* (1881), 17 Ch. D. 58; *Mulcahy v. Archibald* (1898), 28 S.C.R. 523; *Robinson v. McGillivray* (1906), 12 O.L.R. 91, 13 O.L.R. 232; *S.C.*, sub nom. *Robinson Little & Co. v. Scott & Son* (1907), 39 S.C.R. 281; *Gibbons v. Wilson* (1890), 17 A.R. 1; *Davidson v. Fraser* (1896), 23 A.R. 439; *S.C.*, sub nom. *Fraser v. Davidson* (1897), 28 S.C.R. 272; *Gordon Mackay & Co. v. Union Bank of Canada* (1899), 26 A.R. 155.

Secord, in reply.

December 31. The judgment of the Court was delivered by CLUTE, J.:—This is an action to set aside a chattel mortgage dated the 12th August, 1909, from the defendants the Ontario Seed Company Limited to the defendant Adam Uffelman, for \$8,300.

Prior to the incorporation of the defendant company in

1909, Herold and Kusterman carried on business as co-partners under the name of the Ontario Seed Company, and in December, 1909, presented a statement of their affairs to Jacob Uffelman, a merchant of Waterloo, shewing a surplus of \$14,000, upon which he indorsed notes for them, and finally gave his bond for \$5,000 as security for their debt to the Merchants Bank.

In the spring of 1909, the firm being then indebted, and pressed by their creditors, the defendant company was incorporated to take over the business. Jacob Uffelman became a director and secretary-treasurer of the new company, taking \$1,000 of stock. The new company was not floated successfully, only about \$5,000 of the stock being taken up. The Merchants Bank and other creditors were pressing for payment. The bank held as security an assignment of the book-debts, in addition to the bond of Jacob Uffelman.

At a meeting of the directors of the company it was decided to raise money by chattel mortgage. Adam Uffelman is a brother of Jacob Uffelman, and a clerk in his employ, worth about \$11,000. He received a cheque for \$7,000 from Struthers of London, handed to him by his brother Jacob, which he indorsed and handed back to Jacob, who deposited it to Adam's credit in the Merchants Bank on the 3rd August, 1909. He had not asked a loan from Struthers. The money was obtained by Jacob on his own note, without the knowledge of Adam. On the 13th August, Adam gave a cheque to the defendant company for \$8,300, which was deposited to its credit in the Merchants Bank, and on the same day the defendant company gave a cheque to the Merchants Bank for \$8,254.50, being the full amount of their account.

On the 14th August, there was a further deposit to the credit of Adam's account in the Merchants Bank of \$1,000, of which a part was obtained from Jacob and the balance borrowed from another source. These are the only entries in his bank book.

On the 7th September, 1909, the bank assigned to Adam all their interest in the book-debts held by them as security for their indebtedness, the assignment purporting to be in consideration of \$8,254.52 "paid by Adam Uffelman."

The trial Judge made the following findings: (setting them out as above).

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The plaintiffs appeal and contend that the judgment should be varied by declaring the chattel mortgage void *in toto*; and the defendant Adam Uffelman by his cross-appeal asks that the action be dismissed. It will be convenient to deal with the cross-appeal first.

Mr. Gibbons urged that the chattel mortgage was not invalid; that the question of preference was eliminated because the Merchants Bank and Jacob Uffelman—the parties who, it is alleged, were benefited—are not parties to this action; and that it was not void as against creditors, upon the ground that it was made with intent to defeat, hinder, and delay creditors, because there was an actual *bonâ fide* advance in money, and the fact that one creditor was preferred is no offence either against the Statute of Elizabeth or our Act, R.S.O. 1897, ch. 147, sec. 2, sub-sec. 1, which corresponds to it.

It was clearly established that, at the time the chattel mortgage was given, the company was insolvent, and that the effect of the transaction was to give the bank a preference and indirectly to benefit Jacob Uffelman, who was security to the bank, and that it was done with this object in view.

In *Mulcahy v. Archibald*, 28 S.C.R. 523, it was held that a transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution, and to delay or defeat the creditors, is not void under 13 Eliz. ch. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor.

In *Middleton v. Pollock*, *Ex p. Elliott*, 2 Ch. D. 104, Jessel, M.R., points out (p. 108) that “there is no law which prevents a man in insolvent circumstances from preferring one of his creditors to another, except the bankruptcy law. . . . It has been decided, if decision were wanted, that a payment is *bonâ fide* within the meaning of the Statute of Elizabeth, although the man who made the payment was insolvent at the time to his own knowledge, and even although the creditors who accepted the money knew it. Therefore, the mere fact of the deliberate intention of Mr. Pollock, if he entertained that

deliberate intention, of preferring, in case of insolvency, this selected list of clients to the others, would not be sufficient to avoid this claim. Assuming, therefore, that it had been proved not only that he was insolvent, but also that he was insolvent to his own knowledge, I think that, looking at the words of the statute and the authorities, the payment was *bonâ fide* if it was intended to be a payment, and the security was *bonâ fide* if it was intended to be a security. The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor." This case was approved of by the Court of Appeal in *New Prince and Garrard's Trustee v. Hunting*, [1897] 2 Q.B. 19. •

But a deed, though made for valuable consideration, may be affected by *mala fides*: *Harman v. Richards* (1852), 10 Hare 81.

"The Court is to decide in each particular case, whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder or delay his creditors:" *Thompson v. Webster* (1859), 4 Drew. 628, at p. 632, quoted with approval by Fry, J., in *In re Johnson, Golden v. Gillam*, 20 Ch. D. 389, 392, where *Holmes v. Penney* (1856), 3 K. & J. 90, and *Freeman v. Pope*, L.R. 5 Ch. 538, are referred to.

In *Ex p. Games, In re Bamford*, 12 Ch. D. 314, it was held that a bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage to secure an existing debt and future advances, is not necessarily void under the statute 13 Eliz. ch. 5. It will only be void if it is not made *bonâ fide*, i.e., if it is a mere cloak for retaining a benefit to the grantor. In *Alton v. Harrison* (1869), L.R. 4 Ch. 622, Lord Justice Giffard says (p. 626): "I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the Statute of Elizabeth." Applying these remarks, Thesiger, L.J., says, in *Ex p. Games, In re Bamford*, 12 Ch. D. at pp. 324, 325:

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“Taking the question to be, what it plainly must be, was the deed *bonâ fide*, or was it a mere cloak for retaining a benefit to the grantor, what are the facts? Undoubtedly there was good consideration given for the deed; though it was not good under the bankruptcy law, it was perfectly good under the Statute of Elizabeth.”

I have thus fully referred to these authorities because Mr. Gibbons insisted that they clearly shewed that the present case was not within the Statute of Elizabeth (and therefore not within R.S.O. 1897, ch. 147, sec. 2, sub-sec. 1); as the statute has no application to the case of a preference of one creditor over another. No doubt, this is so, but the statute has express reference to the case where the conveyance is made with the intent to delay, hinder, or defeat creditors.

A careful perusal of the evidence satisfies me that there is ample evidence to support the finding of the trial Judge that there was intent to delay and hinder creditors, quite apart from the question of preference. The case was, in my opinion, brought within the Statute of Elizabeth.

I think the case is also clearly within sub-sec. 1 of sec. 2 of the Assignments and Preferences Act. The directors and Jacob Uffelman knew that, unless the creditors were held off in some way, the company must assign. It could not meet its obligations. Jacob knew this, and desired to have the bank paid off and to be discharged as surety. He planned and carried out the scheme, using Adam as his instrument. Adam must have known or should have known this condition of affairs. The money advanced, while in the bank in his name, was obtained and placed there for the purpose by Jacob Uffelman.

In *Campbell v. Patterson, Mader v. McKinnon*, 21 S.C.R. 645, a case somewhat like the present, Gwynne, J., says (p. 653): “The mortgagee William Mader . . . appears to have placed himself wholly as a puppet in the hands of his brother to be dealt with as the latter pleased, for the purpose of effecting a matter in which William Mader in reality had not and was not intended to have any *bonâ fide* interest and in respect of which he was not intended to be subject to any real obligation, but to be simply a tool in the hands of his brother.” Every word of these observations applies to the present case.

Adam Uffelman had not obtained the \$7,300 on his own credit or with any intention, at the time the mortgage was given, of becoming liable to Struthers for the loan; nor did he in fact become liable until some time afterwards.

I think this case is within the language of sub-sec. 1 of sec. 2 of the Act, and that *Burns v. Wilson*, 28 S.C.R. 207, and *Campbell v. Patterson*, *Mader v. McKinnon*, 21 S.C.R. 645, and *Allan v. McLean*, 8 O.W.R. 223, 761, govern the present case. The defendant's appeal fails.

As to the plaintiffs' appeal, the learned trial Judge held that "the transaction can only be impeached to the extent of the difference between the actual value of the book-debts held by the bank on the 13th August, 1909, and \$8,300, because it was in fact only to the extent of that difference that either the bank or Jacob Uffelman, as surety, could be said to be unjustly preferred, and, therefore, that to that extent only could the advance be said to have been *malâ fide* for the purpose of avoiding the statute."

In *Commercial Bank v. Wilson*, 3 E. & A. 257, it was held that, under the very words of the Statute of Elizabeth, the judgment, if fraudulent as to part, is utterly void as against the creditor whose action is attempted to be defeated by it. This decision was followed in *Campbell v. Roche*, *McKinnon v. Roche* (1891), 18 A.R. 646. In appeal to the Supreme Court (*Campbell v. Patterson*, *Mader v. McKinnon*, 21 S.C.R. 645, 653), it was held that *Commercial Bank v. Wilson*, decided under the Statute of Elizabeth, is inapplicable under the Ontario statute, as the Statute of Elizabeth contained no exception corresponding to sec. 3, where the security is for a present actual *bonâ fide* advance of money. The judgment was affirmed upon the ground that it was proven that no part of the consideration was *bonâ fide*.

The bank did not assign its debt to Adam; it was paid off. No doubt it was part of the arrangement that Adam should have the book-debts, and they were included in the chattel mortgage. There was no advance specially in respect of the book-debts.

It is true that the company got the benefit of them as far

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as collected, and, if a *bonâ fide* advance had been made in respect of them, no doubt the mortgage to that extent would have been valid. But the whole advance was one transaction, made, in my opinion, to hinder and delay creditors, contrary to the statute. There being no *bonâ fide* advance by Adam, he has no equitable claim of any kind. He is not entitled to stand in the shoes of the bank and be subrogated to their position in respect of the book-debts. But, if he was, that would not entitle him to his present claim. He has allowed the company to exhaust this part of his security, and now seeks to have his loss made good out of the proceeds of the chattels, to which he has no legal right as against the other creditors. By his own laches he has lost his security, and cannot be heard to say, "True, I have neglected to enforce my claim in respect to that to which I had a title, and now I ask the Court to make good my loss from the proceeds of that to which I have no title."

The judgment of the Court below should be varied by eliminating the clauses having reference to book-debts and deductions on account thereof. The plaintiffs are entitled to the costs of this appeal and of the cross-appeal.

[MIDDLETON, J.]

NEAL V. ROGERS.

1910
Dec. 31.

Injunction—Interim Order—Judicature Act, sec. 58(9)—“Just and Convenient”—Landlord and Tenant—Distress for Rent—Injunction against—Grounds for—Remedy by Replevin—Rent not Payable at a Time Certain.

Before the Judicature Act, when a tenant desired to dispute his landlord's right to distrain, his only remedy, if he desired to prevent a sale, was to replevy the goods; he could not resort to equity for an injunction. And even since the Judicature Act, although the Court has the power, by sec. 58(9), to grant an injunction when "just and convenient," it will only do so when formerly the Court of Chancery would have done so.

Shaw v. Earl of Jersey (1879), 4 C.P.D. 120, and *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, are not now to be regarded as authoritative upon the right to an injunction.

North London R.W. Co. v. Great Northern R.W. Co. (1883), 11 Q.B.D. 30, and *Kitts v. Moore*, [1895] 1 Q.B. 253, specially referred to.

Of the grounds stated for continuing an interim injunction restraining a landlord from proceeding with a distress, the first depended upon a disputed question of fact, the second was as to an omission which the landlord could remedy, and the third rested upon a legal proposition which was not clear or indisputable:—

Held, that, in these circumstances, it would not be "just and convenient" to grant an injunction and deprive the landlord of his security, unless some other equally good were substituted; replevin was a cheaper, more just, and more convenient remedy.

Quære, whether there is a right to distrain when the rent is not payable at a time certain.

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MOTION by the plaintiff, tenant, for an order continuing an interim injunction, granted by a Local Judge, restraining the defendant, the landlord, from proceeding with a distress levied for rent alleged to be due.

December 29. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

J. J. Coughlin, for the plaintiff.

C. A. Moss, for the defendant.

December 31. MIDDLETON, J.:—There is no written lease. Three grounds are alleged: (1) that the rent does not fall due till the end of the year, in April next; (2) that no notice has been given of the cause of the taking; (3) that, upon the landlord's own shewing, the rent was not payable "at a time certain," and so there can be no distress.

Before the Judicature Act, when a tenant desired to dispute his landlord's right to distrain, his only remedy, if he desired to prevent a sale, was to replevy the goods. He could not resort to equity for an injunction. Since the Judicature Act, there are two reported cases in which an injunction has been granted.

For some time after the Act was passed there was much uncertainty as to the effect of sec. 58 (9), giving to the Court the right to grant an injunction when "just and convenient." The view that has ultimately prevailed is that the Courts should only grant an injunction now when formerly the Court of Chancery would have done so.

In *Manufacturers Lumber Co. v. Pigeon* (1910), 22 O.L.R. 36, I collected some of the cases in which this phrase was discussed; and, as bearing on injunctions particularly, would now refer to *North London R.W. Co. v. Great Northern R.W. Co.* (1883), 11 Q.B.D. 30, and *Kitts v. Moore*, [1895] 1 Q.B. 253. Neither of the cases in which an injunction was granted can now be

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regarded as authoritative. In *Shaw v. Earl of Jersey* (1879), 4 C.P.D. 120, Lord Coleridge, C.J., in granting the injunction, stated that the order was without precedent, and granted the injunction on terms fully as onerous as in replevin, *i.e.*, payment into Court of the rent claimed. In *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, the jurisdiction to make the order was not discussed—payment into Court was required, and, upon this being submitted to, the defendant assented to the injunction.

In this case, the first ground depends upon a disputed question of fact. This cannot now be determined. The second ground is one the landlord can remedy. And the third ground is one resting upon a legal proposition by no means clear or indisputable.

In these circumstances, it would clearly not be “just and convenient” to grant an injunction and deprive the landlord of his security if in the end he turn out to be right—unless some other equally good security is substituted. Replevin is a cheaper, more just, and more convenient remedy.

The motion must, therefore, be dismissed. Costs to the defendant in any event.

Had it been certain that the plaintiff was right in his contention that, upon the landlord’s own statement, there was no right to distrain, I should have given him the option of turning his motion into a motion for judgment and resting his case upon this ground alone.

The contention rests upon a statement found in two text-books, Foa, 4th ed., p. 483, and the *Encyclopædia of the Laws of England*, 1st ed., vol. 4, p. 291. Foa cites no authority, and none of the cases cited in the discussion following the statement throw any light upon the matter. The *Encyclopædia* refers to Co. Litt. 47a and 142a. These passages refer to the necessity of the amount of rent being fixed. None of the other text-books seem to give any sanction to the statement.

I do not now determine this question, but draw attention to the matter.

[DIVISIONAL COURT.]

BELCOURT V. CRAIN.

D. C.

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Dec. 31.

Solicitor—Remuneration for Services—Agreement for Payment—Action to Enforce—No Bill Delivered—Solicitors Act, sec. 34.

The plaintiffs, as solicitors, rendered certain services to the defendant, their client, and, while they had in their possession a cheque for a portion of the amount recovered by the defendant in respect of the matters to which their services related, an agreement was made (as the plaintiffs alleged) by which the plaintiffs' charges were fixed at \$1,200. A portion of this was then paid, and, on the faith of the defendant's promise to pay the balance, the cheque was handed over to him. The plaintiffs now sought to recover the balance remaining due after certain payments made:—

Held, upon the evidence, that the agreement was made as alleged, and was a fair one; and that, the action being upon the agreement, sec. 34 of the Solicitors Act, requiring the delivery of a bill of "fees, charges or disbursements for business done by a solicitor as such," was not an answer to it.

Jeffreys v. Evans (1845), 14 M. & W. 210, and *Thomas v. Cross* (1864), 13 W.R. 166, followed.

AN appeal by the defendant from the judgment of the County Court of the County of Carleton in favour of the plaintiffs in an action to recover \$400, the balance alleged to be due of a sum which the defendant (as the plaintiffs alleged) agreed to pay to the plaintiffs, who were solicitors, for professional services.

November 24. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

W. E. Raney, K.C., for the defendant, argued that the agreement between solicitor and client was champertous; that no bill had been rendered before suit, as required by sec. 34 of the Act respecting Solicitors, R.S.O. 1897, ch. 174; and referred to *Re Solicitor* (1907), 14 O.L.R. 464; *Re Solicitor* (1910), 21 O.L.R. 255; *Re McBrady and O'Connor, Solicitors* (1899), 19 P.R. 37; *O'Connor v. Gemmill* (1899), 26 A.R. 27; *Murphy v. Corry* (1906), 7 O.W.R. 363; *Re Geddes and Wilson, Solicitors* (1869), 2 Ch. Ch. 447.

H. S. White, for the plaintiffs, contended that any right to a bill had been waived by the agreement, and that, in the absence of any tariff, the agreement was not champertous. He relied upon *In re Richardson* (1870), 3 Ch. Ch. 144; *Re R. L. Johnston, a Solicitor* (1901), 3 O.L.R. 1; *In re Attorneys, etc.* (1876), 26 C.P. 495.

Raney, in reply.

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December 31. The judgment of the Court was delivered by MIDDLETON, J.:—The only defence suggested in this action which requires any consideration is, that no bill was rendered before suit.

Section 34 of the Solicitors Act, R.S.O. 1897, ch. 174, requires the delivery of a bill of “fees, charges or disbursements for business done by a solicitor as such,” as a condition precedent to an action therefor.

In this case, after the solicitors had rendered the services in question to the client, and, while they had in their possession a cheque from the Department* for a portion of the amount recovered, an agreement was made by which the solicitors’ charges were fixed at \$1,200. A portion of this was then paid, and, on the faith of the defendant’s promise to pay the balance, the cheque was handed over to him. The action is for \$400, the balance now remaining due after certain payments made.

The learned Judge has found the agreement, and that, in the circumstances of the case, the agreement was fair. This finding cannot, upon the evidence, be successfully attacked.

In *Jeffreys v. Evans* (1845); 14 M. & W. 210, an action was brought upon a note given by a client to his solicitor in payment for professional services. The defendant by his plea set up this fact, and that no bill had been delivered. The plaintiff demurred, upon the ground that his action was upon the note, which was a new and independent cause of action, and his counsel contended that the Solicitors Act afforded no answer to his claim to enforce payment of the note. Had his client paid without a bill, he could not maintain an action to recover the money back, Lush, for the client, contended that in truth the action, though based on the new promise, was to recover fees, etc. To this Pollock, C.B., answered: “No; he is only suing on the security given to him, and which must be considered as having been given in discharge of so much of his bills;” and Parke, B., said: “It is perfectly clear what the statute meant—to protect clients if they chose to be protected, not if they chose to give a bond or bill for the debt.”

In *Thomas v. Cross* (1864), 13 W.R. 166, Lord Chancellor

*That is, a Department of the Dominion Government, the plaintiffs’ services being rendered in respect of a claim against the Crown.

Westbury had before him an action to enforce a mortgage taken by a solicitor from his client in payment of costs, no bill having been rendered. At p. 167 it is said: "His Lordship then proceeded to consider the statute with respect to which the question arose, whether there was any prohibition by reason of no bill of costs being delivered. He had a strong impression that those words had been construed judicially to prohibit suits and actions upon that particular contract or *assumpsit* that arose between attorney and client. But when a suit had been commenced on another contract into which the client had entered, there was nothing to which the statute applied. It contained no prohibition against enforcing collateral engagements. His Lordship, therefore, wholly recognised the decision of the Court of Exchequer in *Jeffreys v. Evans*, as applicable to the present case." His Lordship follows this by drawing attention to the fact that the action, a mortgage action, could not be regarded as an action to recover fees, etc.; but this in no way detracts from the earlier statement.

In *Brooks v. Bockett* (1847), 9 Q.B. 847, and *Scadding v. Eyles* (1846), *ib.* 858, it was held that a mere statement of account did not take the case out of the statute, as the action still was one for the recovery of fees, etc. That services rendered afford a basis for such a new promise is clear from the following extract from Halsbury's Laws of England, vol. 7, p. 388, based *inter alia* upon a statement of Bowen, L.J., in *Stewart v. Casey*, [1892] 1 Ch. 104, at p. 115: "When services have been rendered by one person to another at his request, a subsequent promise to pay for the services can be enforced. This is, perhaps, not a real exception to the rule stated above" (*i.e.*, that a past consideration, though a motive for a promise, is not a real consideration), "for in such a case there may be an implied promise to pay for the service, and the subsequent express promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered."

We are not considering here the question of what constitutes payment to preclude taxation under sec. 49, but merely the question arising under sec. 34.

The appeal fails, and should be dismissed with costs.

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[IN THE COURT OF APPEAL.]

REX V. WISHART.

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Nov. 19.	<i>Criminal Law—Fugitive Offenders Act—Arrest of Person Charged with</i>
C. A.	<i>Offence in another Part of His Majesty's Dominions—Warrant not In-</i>
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Dec. 31.	<i>12—Committal of Accused to Await Return—Jurisdiction—Habeas</i>
	<i>Corpus—Lawful Detention—Indorsement of Outside Warrant by Judge</i>
	<i>of High Court.</i>

The prisoner was arrested, in the city of Toronto, on a provisional warrant under the Fugitive Offenders Act, R.S.C. 1906, ch. 154, pursuant to a warrant for his apprehension issued by a Justice of the Peace for a county in Ireland, where the offence charged (embezzlement) was alleged to have been committed, and, after an inquiry before the Police Magistrate for the city of Toronto, was committed by him to prison, to await return under the Act. The prisoner was apprehended and brought before the Police Magistrate, and so committed, without the warrant having been indorsed as provided by sec. 8 of the Act. The prisoner obtained writs of *habeas corpus* and *certiorari* in aid, and by the return thereto it appeared that he was detained under the authority of the Police Magistrate's warrant of commitment. Upon the application for the prisoner's discharge, the Irish warrant was indorsed by the Judge of the High Court who heard the application:—

Held, MEREDITH, J.A., dissenting, that the Police Magistrate had no jurisdiction to enter upon the inquiry, and therefore no jurisdiction to commit the prisoner under sec. 12 of the Act; and the prisoner should be discharged.

Per MOSS, C.J.O.:—A provisional warrant may be issued either before or after the indorsement of the warrant issued outside of Canada; but sec. 14 makes it plain that a magistrate before whom a person apprehended under a provisional warrant is brought cannot immediately proceed with an investigation. He can only remand from time to time pending the production of an indorsed warrant, which is his authority to enter upon the investigation. The expression "indorsed warrant," frequently occurring in the Act, has more significance than as a term used merely to distinguish it from a provisional warrant. If it was intended to constitute a warrant without indorsement a sufficient authority to the magistrate to proceed, some other expression more distinctly suggestive of that intention would have been used. At all events, it is safer, in dealing with a matter involving restraint of liberty, to adhere to the primary meaning of the language used, in the absence of a context manifestly controlling it and pointing to a different meaning.

Per MEREDITH, J.A.:—Upon the proper construction of the Act, an indorsed warrant was not essential to the magistrate's jurisdiction; and, even if sec. 12 required the production, before the magistrate, of an indorsed warrant for apprehension before committing him, the prisoner would not be entitled to his discharge; the warrant having been indorsed by the Judge of the High Court who heard the application for the prisoner's discharge upon the return to the writs, the prisoner was rightly in custody.

Judgment of MEREDITH, C.J.C.P., reversed.

MOTION by the defendant, upon the return to writs of *habeas corpus* and *certiorari* in aid, for his discharge from custody, in the circumstances mentioned in the judgments.

November 15. The motion was heard by MEREDITH, C.J.C.P., in Chambers.

W. T. J. O'Connor, for the defendant.

J. R. Cartwright, K.C., for the Crown.

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November 19. MEREDITH, C.J.:—The prisoner was arrested in Toronto on a charge of embezzlement, under a warrant for his apprehension issued by a Justice of the Peace for the county of Down, in Ireland, where the offence is alleged to have been committed, and, after an inquiry before the Police Magistrate for the city of Toronto, has been committed by him to prison, to await his (the prisoner's) return under the provisions of the Fugitive Offenders Act, R.S.C. 1906, ch. 154.

The prisoner was apprehended and brought before the Police Magistrate without the warrant having been indorsed as provided by sec. 8 of the Act, which is as follows:—

“8. Whenever a warrant has been issued in a part of His Majesty's dominions for the apprehension of a fugitive from that part who is or is suspected to be in or on the way to Canada, the Governor-General or a Judge of a Court, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend the fugitive and bring him before a magistrate.”

The manner of indorsing the warrant is provided for by sec. 21, which is as follows:—

“21. An indorsement of a warrant in pursuance of this Act shall be signed by the authority indorsing the same, and shall authorise all or any of the persons named in the indorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within Canada by apprehending the person named in it, and bringing him before a magistrate in Canada, whether he is the magistrate named in the indorsement or some other.”

A writ of *habeas corpus* and *certiorari* in aid having been issued and returned, and it appearing from the return that the prisoner is detained under the authority of the warrant of the

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Police Magistrate to which I have referred, the prisoner now moves for his discharge, on the ground that his detention is unlawful, because: (1) the warrant for his apprehension not having been indorsed pursuant to sec. 8, his arrest was unlawful; (2) it is a condition precedent to the exercise of the jurisdiction conferred by sec. 12, that the warrant shall be indorsed pursuant to sec. 8, and that, not having been so indorsed, the Police Magistrate had no jurisdiction to enter upon the inquiry mentioned in sec. 12 or to commit the prisoner.

It is clear that, had the prisoner been charged with an offence against the criminal law of Canada, and been committed for trial for the offence, that he had been apprehended without lawful authority, or even that he had been unlawfully brought back to Canada from a foreign country, would afford no ground for his discharge from custody: *Rex v. Whitesides* (1904), 8 O.L.R. 622, and cases there cited.

I see no reason why the rule enunciated and applied in these cases should not obtain where proceedings are taken under the Fugitive Offenders Act.

Section 11 provides that "a fugitive, when apprehended, shall be brought before a magistrate, who, subject to the provisions of this Act, shall hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including the power to remand and admit to bail, as if the fugitive was charged with an offence committed within his jurisdiction."

Now it is clear, from the cases that have been referred to, that a magistrate would have jurisdiction to commit for trial a person brought before him charged with an indictable offence, notwithstanding that the person charged had been unlawfully apprehended; and, unless the qualification "subject to the provisions of this Act" makes it a condition precedent to the exercise by the magistrate of the jurisdiction conferred by the Act that the warrant mentioned in sec. 8 has been indorsed as provided by that section, the detention of the prisoner is not unlawful.

In my opinion, the qualification has no such effect. The purpose of it is manifestly to make the exercise of the jurisdiction and powers conferred by the section subject to what is

provided in sec. 12, *viz.*, that there is a warrant such as is mentioned in sec. 8, that it is duly authenticated, that the offence is one to which the Act applies, and that the evidence is of the character mentioned in sec. 12.

The provision of sec. 12 is not, "if the warrant be indorsed and duly authenticated," but "if the indorsed warrant . . . is duly authenticated," and the reference to it as an "indorsed warrant" is, I think, merely for the purpose of distinguishing it from the provisional warrant mentioned in secs. 9 and 10.

The result is that, in my opinion, the prisoner is lawfully detained, and he must be remanded.

It may be well, however, to say that a departure from the procedure prescribed by the Act may render the person who apprehends under a warrant which has not been indorsed, if it is not a provisional warrant, liable to an action for making an illegal arrest, and it would be well, I think, if the attention of the police authorities were called to this.

The defendant appealed to the Court of Appeal from the order of MEREDITH, C.J.

November 24. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

T. J. W. O'Connor, for the defendant, argued that the committal by the magistrate was illegal, the warrant having been issued in Ireland and not indorsed in the manner provided by the Fugitive Offenders Act, sec. 8. The learned Judge in the Court below relied upon *Rex v. Whitesides*, 8 O.L.R. 622, but that case is distinguishable from the one at bar: see *Regina v. McHolme* (1881), 8 P.R. 452, especially at pp. 460, 461.

J. R. Cartwright, K.C., for the Crown, argued that the case was covered by *Rex v. Whitesides*, and that no benefit could result to any one from giving effect to the defendant's contention.

December 31. MOSS, C.J.O.:—This case is brought before us under the provisions of R.S.O. 1897, ch. 83, sec. 6, by way of appeal from an order pronounced by the Chief Justice of the Common Pleas, upon the return to a writ of *habeas corpus*,

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whereby the prisoner was remanded to the custody of the gaoler of the city of Toronto.

The prisoner had been apprehended and brought before George T. Denison, Esquire, Police Magistrate for the city, under a provisional warrant issued under ch. 154 of the R.S.C. 1906, known as the Fugitive Offenders Act, and was by him committed to the common gaol to await his return to Ireland.

A warrant issued in Ireland for the apprehension of the prisoner was produced before the Police Magistrate, but when produced it was not indorsed by the Governor-General or a Judge of the High Court in the manner provided by sec. 8 of the Act.

Upon the argument of the motion for the prisoner's discharge under the writ of *habeas corpus*, the learned Chief Justice indorsed the warrant, and ordered that the warrant of commitment granted by the Police Magistrate be confirmed.

The main question raised upon the appeal is, whether the Police Magistrate could proceed finally to deal with the case and commit the prisoner under sec. 12 of the Act, notwithstanding that the warrant issued in Ireland was not indorsed in the manner directed by sec. 8.

I confess to having been strongly impressed with the argument that the words "indorsed warrant," which occur in sec.

12, were used only for the purpose of distinguishing between a warrant issued outside of Canada and a provisional warrant issued within Canada, and that, provided the person was duly apprehended under the latter, and that the warrant issued outside of Canada was duly authenticated in the manner prescribed by sec. 29, the magistrate was authorised to proceed, and, if satisfied with the other proofs, commit the prisoner.

But, upon further consideration, I have reached the conclusion that the requisition for the indorsement of the warrant was enacted with an object beyond that of merely rendering it available for the apprehension of the accused person without any other warrant.

Under sec. 8 the Governor-General or a Judge is only to indorse the warrant when he is satisfied that it was issued by some person having lawful authority to issue it. This require-

ment furnishes a protection to an accused person against frivolous or vexatious proceedings. A somewhat similar protection is afforded to the accused when apprehended under a provisional warrant. By sec. 10, a magistrate issuing such a warrant is required to send a report of the issue, together with the information or a certified copy, to the Governor-General, who may, if he thinks fit, discharge the person apprehended under such warrant.

Apparently a provisional warrant may be issued either before or after the indorsement of the warrant issued outside of Canada; but sec. 14 makes it plain that a magistrate before whom a person apprehended under a provisional warrant is brought cannot immediately proceed with an investigation. He can only remand from time to time pending the production of an indorsed warrant. The production of a warrant indorsed by the Governor-General or a Judge is *primâ facie* what is meant by this section.

It seems plainly to be intended to operate as the authority to the magistrate to enter upon the investigation. He is then in a position to enter upon the inquiry which, under sec. 12, he is required to make, whether the indorsed warrant is duly authenticated and whether the evidence is such as to satisfy him that a case is shewn for committing the fugitive to prison to await his return to that part of His Majesty's dominions from which the warrant issued. I can come to no other conclusion than that the expression "indorsed warrant," occurring, as it does, so frequently in the Act, has some greater significance than as a mere term of distinction between it and another warrant. If it is so called merely for the purpose of distinguishing it from a provisional warrant, then, unless it is desired to apprehend by virtue of it under sec. 8, or to obtain a search warrant by virtue of it under sec. 19, no indorsement by the Governor-General or a Judge is needed. If so, there seems to be no occasion for speaking of it as an indorsed warrant when directing what the magistrate shall do under secs. 12 and 14. It can scarcely be that, if it was intended to constitute a warrant without indorsement a sufficient authority to the magistrate to proceed, some other expression more distinctly suggestive of that intention would not have been used.

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At all events, it appears to me that it is safer, in dealing with a matter involving restraint of liberty, to adhere to the primary meaning of the language used, in the absence of context manifestly controlling it and pointing clearly to a different meaning. I think, therefore, that the prisoner was entitled to be discharged under the writ of *habeas corpus*.

Having regard to the nature of the case and the circumstances under which it comes before us, I do not think we should impose any restraint upon the prisoner's right to the order to which it is now held he was entitled.

We need not concern ourselves with the question of the extent to which it may prove to be of advantage to him.

GARROW, J.A., concurred.

MACLAREN, J.A.:—The accused was arrested under a provisional warrant issued under sec. 9 of the Fugitive Offenders Act, by the Police Magistrate for the city of Toronto.

When the Irish warrant arrived, the magistrate proceeded under sec. 12 to hold an investigation, and at its close committed the accused to prison to await his return to Ireland. Up to this time the warrant had not been indorsed by the Governor-General or by a Judge of the High Court, as provided by sec. 8 of the Act. When the accused was brought before Meredith, C.J., on the return of the writ of *habeas corpus*, the latter indorsed the Irish warrant, quashed the writ of *habeas corpus*, confirmed the warrant of the Police Magistrate, and re-committed the prisoner to be returned to Ireland for trial.

It was argued before us that the committal by the magistrate and the detention of the accused were illegal because the Irish warrant had not been previously indorsed.

It is true that secs. 8 and 21 of the Act read as if the only object of the indorsement of the warrant by the Governor-General or a Judge of the High Court is to authorise the apprehension of the fugitive and the bringing of him before a magistrate, and, this having been done under the authority of a provisional warrant, the learned Chief Justice held that this was no longer necessary where the fugitive had already been arrested

and brought before a magistrate. I was at first disposed to adopt this view of the Act; but sec. 14 would seem to indicate that the magistrate should not proceed to the final committal on the provisional warrant alone without an indorsed warrant. That section reads as follows: "A fugitive apprehended on a provisional warrant may, from time to time, be remanded for such reasonable time, not exceeding seven days at any one time, as under the circumstances seems requisite for the production of an indorsed warrant." Besides, the fugitive is only to be arrested on a warrant from another part of His Majesty's dominions when the Governor-General or a High Court Judge is satisfied that the warrant was issued by some person having lawful authority to issue the same, and has indorsed it. I do not think the Act intended that the accused should be deprived of any benefit he might possibly derive from the observance of this provision.

If nothing further appeared, I would be of the opinion that the accused would be entitled to his discharge. But among the papers sent up to us on this appeal is the Irish warrant indorsed by the learned Chief Justice, and bearing the same date as his order to remand the prisoner. I do not think this should be wholly disregarded. The learned Chief Justice does not in his judgment refer to it, because he considered the warrant of committal by the Police Magistrate sufficient. The Irish warrant now appearing to be properly indorsed, and being among the papers sent up to us from the Court below, and this authorising the arrest and detention of the accused, he will, no doubt, be dealt with under it. We should certify under the statute that he is not liable to detention under the Police Magistrate's warrant of committal.

MAGEE, J.A.:—Under the Fugitive Offenders Act, R.S.C. 1906, ch. 154, it is, I think, clear that the foundation of the authority for the enforced return of an alleged offender to another part of His Majesty's dominions is the existence of a warrant issued in such other part for his apprehension, which has been submitted to the Governor-General or a Judge, who in Ontario must be a Judge of the High Court of Justice, and

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which has been indorsed by him, if he is satisfied that it was issued by some one having lawful authority to issue it.

The authority to indorse such a warrant, which for convenience I may call the outside or extra-Canadian warrant, is given by secs. 8 and 21, when the Governor-General or the Judge is so satisfied. When so indorsed the warrant and indorsement become authority for apprehending the fugitive and bringing him before a Justice of the Peace or other magistrate without other process (sec. 7, 8, and 21), and under sec. 20 it becomes also authority for a magistrate to issue a search warrant.

For the mere apprehension of the fugitive, however, it is not necessary to wait for the outside warrant or its indorsement. A Justice of the Peace or other magistrate may issue a provisional warrant under which the offender may be arrested and brought before him or another magistrate: secs. 7, 9, 11.

Whether the apprehension is made under such a provisional warrant or an indorsed outside warrant, he is to be brought before a magistrate, and the magistrate shall, "subject to the provisions of this Act," proceed to hear the case in the same manner and have the same jurisdiction and powers as nearly as may be as if the fugitive was charged with an offence committed within the magistrate's own jurisdiction: sec. 11. But, if the offence were committed in Canada, he could only send the prisoner to gaol or admit him to bail for trial here in due course, and could not send him to Ireland or elsewhere, or direct his imprisonment to await any order from the Governor-General; and, therefore, some further special provision was necessary to carry out the purposes of the Act. So far there is no direction to the magistrate to inquire as to the genuineness of or authority for issuing the outside warrant. Accordingly, we do find further provisions. Under sec. 14, if the arrest has been made under a provisional warrant, the magistrate may remand the fugitive from time to time, but not over seven days at once, for such reasonable time as seems requisite for the production of an indorsed warrant. The necessity for an indorsed warrant is here indicated by the authority to wait for one to be produced and by the restriction to a reasonable time. If one were not forthcoming within that time, manifestly this right to remand

would come to an end. Then in sec. 12 we find the authority and the only authority for the magistrate's final action—"If the indorsed warrant for the apprehension of the fugitive is duly authenticated," and the evidence raises the necessary presumption of guilt, the magistrate shall commit the fugitive to prison to await his return to the other part of the British dominions, and shall send a certificate of the committal and a report of the case to the Governor-General, and under sec. 15 the latter, after fifteen days, may order the fugitive to be returned. That section, 12, is the only section which authorises the magistrate to commit to await deportation, and that authority is given if "the indorsed warrant" be duly authenticated.

In the present case the appellant, who was alleged to be a fugitive from Ireland after committing an offence there, was arrested under a provisional warrant and brought before the magistrate, who proceeded to take evidence and finally committed him to gaol to await his return to Ireland. At some stage in the proceedings before the magistrate, a warrant issued in Ireland was produced to him and authenticated under sec. 29, but it had not been submitted to or indorsed by the Governor-General or a Judge; and, though its mere execution may have been satisfactorily established before the magistrate, neither the Governor-General nor a Judge had been satisfied that the person by whom it purported to be issued had lawful authority, and had issued it. At no time had an indorsed warrant been produced to the magistrate or existed before the final committal of the prisoner.

Application on *habeas corpus* and *certiorari* was made for his discharge upon that ground. It was refused by the learned Chief Justice, who took the ground that the indorsement of the Irish warrant was not a condition precedent to committal under sec. 12, and that the words "indorsed warrant" in that section were only used to distinguish the outside warrant from the provisional warrant.

If sec. 12 stood alone, it would still, I submit, with all deference, be a strained interpretation to say that, when Parliament used the expression "indorsed warrant," it meant a warrant which had not been or at least might not have been indorsed.

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No doubt, it may seem an unnecessary thing to have a warrant again authenticated before the magistrate which by its indorsement shewed that it had been satisfactory to the Governor-General or a Judge. That may have been an unnecessary provision; but a consideration of secs. 8, 12, 14, and 29, shews, I think, clearly, the difference between the functions of the Governor-General or Judge and those of the magistrate, and the indispensableness of the exercise of those of the former.

I do not understand the learned Chief Justice to mean at all that in sec. 12 the outside warrant is referred to, and its authentication only required in case the arrest has been made under it. That could hardly be so, because, unless indorsed, an arrest could not be made under it, and there would be no reason for discarding the word "indorsed." If, then, its production is required whether the arrest has been made under it or under a provisional warrant, are we justified in saying it need not be produced in the condition which the section mentions, and, for which, under sec. 14, the case may be, if not must be, delayed?

The attention of the learned Chief Justice does not seem to have been drawn to sec. 14 or sec. 29 or the functions of the Judge under sec. 8. Under sec. 29 the authentication of the warrant is established by the formal proofs there mentioned of its genuineness, and that is all that sec. 12 required the magistrate to see to. Nowhere but in sec. 8 are there restrictions upon the character of a foreign warrant. The importance of sec. 8 thus becomes manifest. If the magistrate is only to see to the authentication of the foreign warrant, and if it need not be indorsed, why should the Governor-General or the Judge be asked to satisfy himself as to the lawful authority of the official issuing it, when the case can proceed just as well without any one taking such care?

In the Imperial Fugitive Offenders Act, 1881, 44 & 45 Vict. ch. 69, from which our Act is adapted, our secs. 12 and 14 are both incorporated in sec. 5, and in Part II. of that Act, relating to surrender of fugitives between different part of a contiguous group of British possessions, it is very plainly expressed in sec. 16, which authorises the issue and execution of a provisional warrant—"provided that a person arrested under such pro-

visional warrant shall be discharged unless the original warrant is produced and indorsed within such reasonable time as may under the circumstances seem requisite."

With all respect, therefore, I think that full effect should be given to the word "indorsed" in sec. 12. It follows that, as that section is the only authority for the committal, and its condition was not complied with, the warrant of committal was, as I consider, invalid. In that view, the cases as to illegality of an arrest being no ground for a discharge from subsequent commitment for trial, hardly apply. Here there is want of authority for the commitment itself.

Then, assuming that the commitment was invalid, is the appellant entitled to be discharged?

The gaoler on the 14th November, 1910, in his return to the writ of *habeas corpus*, stated that he held him under only two causes or warrants. One was a warrant of the 23rd September, which became effete on the 30th September, and the other was that of the 2nd November, which was, in my view, invalid, and to which is annexed the Irish warrant. That Irish warrant, as now brought before us, bears the indorsement of the learned Chief Justice, having the same date as his order appealed from, that is, the 15th November, and we may assume that it was not made after the order. The latter not only dismisses the application for discharge and confirms the commitment, but also remands the prisoner to the gaoler's custody. The indorsement expressly authorises the Chief Constable of Toronto, and all other persons to whom the warrant itself was originally directed, or by whom it may be lawfully executed, and also all peace officers in Canada, to execute it within Canada.

We must assume that the learned Chief Justice was satisfied under sec. 8 of the Act before indorsing. The warrant so indorsed became authority under secs. 7, 8, and 21 for apprehending the accused and taking him before a magistrate, but it was not of itself an authority for sending him to gaol or keeping him there—although "apprehension" includes detention of one already in custody: *The Queen v. Weil* (1882), 9 Q.B.D. 701. If the fugitive is already before the magistrate on a provisional warrant, then the indorsement authorises the final committal

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by the magistrate if the evidence warrants it (sec. 12). But the possession of the Irish warrant so indorsed does not authorise any one but the magistrate before whom he is brought to send the prisoner to gaol. The whole authority is statutory, and the Court has no power to exercise it. In *Ex p. Besset* (1844), 6 Q.B. 481, where the magistrate, instead of committing the accused for extradition, had committed him to gaol "until thence delivered by due course of law," as if for trial in England, the Court, on application for his discharge on *habeas corpus*, said: "Neither we nor the gaoler have any power but such as the statute gives; and its provisions have not been rightly pursued. We are asked to remand the prisoner on our own authority, as charged with a crime: but we know nothing of the crime unless as it is brought before us by the warrant; or, I should rather say, we have no authority of the kind in such a case. If we could act in the manner suggested, the statute would have been unnecessary. The prisoner must be discharged." That was a stronger case for his retention than the present one.

No doubt, where there was justification for making a valid commitment for trial, the Courts, in the case of offences within the jurisdiction, have not allowed the fact of an informality or insufficiency in the warrant itself to set loose one whom the Court could see there had been a right validly to commit for that purpose.

In *Bethell's Case* (1701), 1 Salk. 348, the Court held that, if the commitment from Oyer and Terminer was without cause, the prisoner might be delivered, but when there appeared a good cause, but a defect only in the form of the commitment, he ought not to be delivered.

In *In re Tivnan* (1864), 5 B. & S. 645, an extradition case, to counsel objecting that the warrant should state that the evidence was on oath, Blackburn, J., said (p. 668): "Suppose the magistrate's warrant defective in this respect, it could be cured by a fresh warrant. We would not discharge on *habeas corpus* for such a reason."

The case of *The King v. Marks* (1802), 3 East 157, is frequently referred to as authority for not releasing a prisoner on account of insufficiency in the warrant, but there, the prisoners

being brought up on *habeas corpus* and application made for bail, the depositions shewed good ground for the charge of felony, and what the Court did was to refuse bail, and, in order to prevent repeated applications for *habeas corpus*, the prisoners were discharged from custody under the existing defective warrant, but were by the Court committed for trial, the practice previously having been merely to remand.

In *Ex p. Krans and Others* (1823), 1 B. & C. 258, the prisoners captured at sea were held without written warrant on a royal vessel to be forwarded to London for smuggling and murder, and the Court, having obtained the depositions before a coroner as to the murder, and finding good ground for their commitment, held the confinement valid, but, apparently with a view only to more prompt inquiry, committed them to the Court's own prison, to be taken before a magistrate for inquiry. (As to that prison see *Rex v. Shebbeare* (1758), 1 Burr. 460). Here again the Court acted of its own authority on good cause appearing. Referring to that case in *Ex p. Terraz* (1878), 4 Ex. D. 63, Kelly, C.B., said (p. 68): "The language of Lord Tenterden is conclusive upon the point that, where in such a case there must be further inquiry which requires the continued imprisonment of the party charged, if a *habeas corpus* be obtained, he is not to be discharged, but should be remanded for the purpose of the further inquiry." So in *In re Shuttleworth* (1846), 9 Q.B. 651, although the proceedings were not defective, the Court said that, if they had been, yet, as it appeared that the prisoner was a dangerous lunatic, it would have been their duty not to release him. In the case of the Canadian prisoners, *In re Parker and Others* (1839), 5 M. & W. 32, the Court held that, even if the temporary confinement at Liverpool were unauthorised, it was the duty of the Court, as of any subject, to arrest and hold them, they being convicted of treason. The confinement in that case had been, in *Watson's Case* (1839), 9 A. & E. 731, held lawful.

In 1 Burr's Trial 79 (quoted in Church on Habeas Corpus, 2nd ed., sec. 290), Chief Justice Marshall said: "It is believed to be a correct position that the power to commit for offences of which it has cognizance is exercised by every Court

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of criminal jurisdiction, and that Courts as well as individual magistrates are conservators of the peace. Were it otherwise, the consequence would only be that it would become the duty of the Judge to descend from the bench, and in his character as an individual magistrate to do that which the Court is asked to do." Thus, where the Court sees that there is legal ground for holding the prisoner for trial or inquiry, it will, if necessary, exercise its own inherent powers for that purpose in proper cases. But here, as already mentioned in citing *Ex p. Besset*, 6 Q.B. 481, the authority is purely statutory.

Original illegality of arrest, also, has not been allowed as a ground for release, when the subsequent proceedings are regular: *Ex p. Scott* (1829), 9 B. & C. 446; *The Queen v. Weil*, 9 Q.B.D. 701; and see *In re Walton* (1905), 11 O.L.R. 94; *Rex v. Whitesides*, 8 O.L.R. 622.

Cases have arisen under the Extradition Acts in which the discharge of the prisoner has been asked on account of objections to the description of the offence in the warrant or other irregularity, and refused, but it will be found that the refusal has been because the proceedings were really sufficient. Of such are *Regina v. Jacobi* (1881), 46 L.T.R. 595) (n); *Ex p. Piot* (1883), 48 L.T.R. 120, 15 Cox C.C. 208; and *The Queen v. Ganz* (1882), 9 Q.B.D. 93. But I have not found any case in which the prisoner has been remanded for a different purpose from that for which it was originally intended to send him to gaol, nor any case in which, there being no authority for commitment, the Court has remanded the prisoner to gaol merely because, subsequently to the return to the writ of *habeas corpus*, an authority has arisen for apprehending him. See *In re Walton*, *supra*, where a second return to the writ was put in.

In *Ex p. Terraz*, 4 Ex. D. 63, the provisional warrant for arrest was for "crimes against bankruptcy law" in Switzerland, and, after rule *nisi* for *habeas corpus*, before evidence taken, a second warrant was issued specifying the crime. The Court held the first warrant sufficient; but Kelly, C.B., said, "The whole case turns upon the first warrant;" and again, "I do not think we ought to refer to or act upon the second warrant, except by way of illustration;" and, in line with the other cases I

have referred to, he said: "Dealing with this case as if the prisoner were before us on a writ of *habeas corpus*, the result would necessarily be, the warrant not being upon a conviction or judgment, but one merely authorising detention in prison until further inquiry, that he would be remanded in custody for the purpose of such further inquiry."

In *Regina v. Chaney* (1838), 6 Dowl. P.C. 281, *certiorari* being taken away, the Court would not look at the valid conviction, but discharged the defendant, the commitment being invalid.

This prisoner is in a gaol, not before a magistrate, nor on remand to be brought before one. We have no authority that I am aware of to say to him, "You are wrongfully where you are, but we will send you before a magistrate." The only warrant on which he is held is not one for further inquiry, but one upon which he will be sent out of the country if the Governor-General so directs. It is the final execution, as it were, within Canada, upon the judicial proceedings. It is invalid, not because of form, but because of want of authority in the magistrate or any one else at that time to issue it. The production to him of the document which was necessary to his authority, and upon which no one but he could commit to gaol for deportation, has never yet been made. There is no authority under the statute in any one to send this man to gaol at present. And on the 2nd November he could not even have been remanded by the magistrate to the 15th November, when this Irish warrant was indorsed, but only for eight days.

I hope I am not taking too narrow a view of the duty of the Court under the writ. It is a vital remedy, and its power and use should not be weakened or restricted. What has been done by the magistrate, in the present instance, has been done innocently; but cases may arise in which there may be high-handed, wilful disregard of the law; and countenance should not be given to the idea that, when the wrongful action is challenged, subsequent compliance with the law would suffice to prevent interference.

I consider that the appeal should be allowed and the prisoner discharged.

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MEREDITH, J.A.:—The single ground upon which the prisoner now seeks his discharge from custody is, that the Irish warrant for his apprehension was not indorsed at the time when he was committed to await his return to Ireland.

Such an original warrant is the substantial basis of the proceedings under the Act; but its indorsement is for the purpose of apprehending the fugitive only. Section 17 provides that a fugitive may be apprehended under an indorsed, or a provisional, warrant; sec. 8, that the Governor-General, or a Judge of a Court, may indorse, and that the warrant so indorsed shall be sufficient authority for apprehending the fugitive and bringing him before a magistrate; and sec. 21, that the indorsement shall authorise all or any of the persons named in it, and the persons to whom the warrant was originally directed, and also every constable, to execute the warrant in Canada, by apprehending the person named in it and bringing him before a magistrate in Canada. The effect is this: the original warrant is ineffectual for such purposes until its authenticity has been established and is attested by such indorsement—that is, established to the satisfaction of the Governor-General or a Judge of a Court; an obviously proper provision to guard against the execution of warrants issued without lawful authority; but even that is not deemed sufficient for the purpose of commitment. Under sec. 12 the magistrate is required to see that it is duly “authenticated.”

Section 12, on which the prisoner’s contention is based, provides that: “If the indorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as, subject to the provisions of this Act, according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case, as he thinks fit, to the Governor-General.”

The section does not require the magistrate to see that the warrant is indorsed, but only that it is duly authenticated. The

words "indorsed warrant" seem to me to be used to distinguish it from the "provisional warrant" under which there is power to apprehend and remand only: sec. 14. Some qualifying word was necessary; "indorsed" and "provisional" are the qualifying words used throughout the Act; and so "indorsed" would be used to distinguish it from "provisional."

The case would have been stronger for the prisoner if the magistrate were bound by the authentication of the Governor-General or a Judge, evidenced by the indorsement; but that is not so; it is the indorsed warrant which is to be authenticated before the magistrate: authentication for apprehension is one thing, authentication for commitment another.

Given this descriptive meaning, the Act is sensible and workable; given a meaning which would exclude jurisdiction, the inquiry by the magistrate as to the authenticity of the warrant would be a useless proceeding; and the net result, at the most, would be a reapprehension and going over the same ground again for no sensible purpose.

I am, therefore, of opinion that, upon the proper construction of the Act, an indorsed warrant was not essential to the magistrate's jurisdiction; and so the appeal fails and should be dismissed.

There is no reason why a larger meaning should be given to the words "indorsed warrant," by reason of anything contained in sec. 14, which provides only for that which may be done under a provisional warrant after apprehension upon it. The section is intended to confer power upon the magistrate in that respect, and not in any sense to restrict his power under any of the other provisions of the Act; the full effect of it is that the magistrate can remand, but that is all, under the provisional warrant. The reason of this is plain; the other warrant is the basis of the whole proceedings; the warrant itself, not the indorsement, which is clearly, under the sections I have referred to, for the purposes of apprehension only. In short, sec. 14 is but the complement of sec. 8. Section 8 provides for apprehension on a provisional warrant pending the arrival of the other (what shall I call it, "original," "indorsed," or what else?) warrant; and sec. 14, for detention until its arrival; it has nothing to do with the magistrate's power under sec. 12.

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I am quite unable to see, or to imagine, any hidden political, or any other kind of, significance, or indeed anything at all extraordinary, in the provision for the indorsement of the warrant; it is but a matter of practice of the most usual character: ordinarily a warrant to apprehend, to be executed out of the jurisdiction of the magistrate who issued it, is, by statute, required to be first indorsed by a magistrate having jurisdiction in the place where it is to be executed: but it could hardly be contended that the want of such an indorsement would vitiate all subsequent proceedings, however remote. That there can be no hidden significance seems to me to be very plain, for these reasons: (1) its purpose is plainly expressed—to authorise the apprehension of the person named in it; (2) any Judge of the High Court, in this Province, has the same power, in this respect, as the Governor-General; and a Judge could hardly be expected to exercise any but judicial power; and (3), ample provision is made for the interposition of political, or other, considerations at the proper time, the close of the proceedings, when the facts are all disclosed: the fugitive is sent back only on the warrant of the Governor-General, to whom a certificate of committal for such purpose, with a report of the case, is to be sent forthwith after he has been so committed: see secs. 15 and 12.

I must still decline to assent to that which seems to me to be nothing but putting an entirely unnecessary obstacle in the way of bringing a person, duly and reasonably charged with a crime, to a fair and speedy trial.

But would the prisoner be entitled to his discharge, even if sec. 12 required the production, before the magistrate, of an indorsed warrant for apprehension before committing him? The detention is under a warrant of commitment to which no objection is taken; the “indorsed warrant” is now indorsed in accordance with the requirements of the Act; so that the single point upon which this appeal is brought is a purely technical one, and one which was not in any manner raised before the magistrate; if it had been, the indorsement could have been had before proceeding further. I would hesitate much before acceding to the view, upon these *habeas corpus* proceedings, that the prisoner would be entitled to any relief; and could not at all accede to his

contention that he should be discharged, although that discharge would be followed by an immediate reapprehension and a valid commitment in due course. At the most, the result would, in my opinion, be that, the magistrate's proceedings under sec. 12 being void, the prisoner is still in custody under the warrants to apprehend, or one of them, and so could not rightly be discharged, but should be proceeded against under the indorsed warrant, and a valid commitment made in due course: *The Queen v. Hughes* (1879), 4 Q.B.D. 614; *The Queen v. Weil*, 9 Q.B.D. 701; and *Rex v. Coote* (1910), 22 O.L.R. 269.

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Appeal allowed; MEREDITH, J.A., dissenting.

[IN THE COURT OF APPEAL.]

REX v. SAM SING.

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Dec. 31.

Criminal Law—Carnal Knowledge of Young Girl by Householder upon his own Premises—Criminal Code, sec. 217—Application and Scope of—Proof of Knowledge of Age.

The defendant was charged with an offence against sec. 217 of the Criminal Code, which provides that "every one who, being the owner or occupier of any premises . . . induces or knowingly suffers any girl under the age of eighteen years to resort to or be in or upon such premises for the purpose of being unlawfully or carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence . . . :"—

Held, that it was not necessary for the Crown to prove that the defendant knew that the girl was under the age of eighteen years.

Held, also, MACLAREN and MAGEE, J.J.A., dissenting, that it is not an offence, within the section, for the owner of the premises to induce or suffer a girl within the prescribed age to be thereon for the purpose of himself having connection with her; the object of the section is to forbid the use of premises as assignation-houses to which young girls may, or may be induced, to resort; the section is applicable to cases of permission, not commission.

CASE stated by the Judge of the County Court of Carleton.

The following statement of the facts is taken from the judgment of GARROW, J.A.:—

The charge was of an offence under sec. 217 of the Criminal Code, which reads as follows:—

"Every one who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl under the age of eighteen years to resort to or be in or upon such

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premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence, and is liable,—

“(a) to ten years’ imprisonment if such girl is under the age of fourteen years;

“(b) to two years’ imprisonment if such girl is of or above the age of fourteen years.”

And the questions reserved were:—

“1. Was it necessary for the prosecution to prove that the accused knew the girl was under the age of eighteen years in order to support the charge?

“2. Was it necessary for the prosecution to prove that the accused suffered the girl to be in the premises for the purpose of being carnally known by some man other than himself?”

The evidence is not made part of the case.

November 24. The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

G. F. Henderson, K.C., for the prisoner, dealing in the first place with the second question raised in the case, argued that the judgment in *Rex v. Karn* (1909), 20 O.L.R. 91, did not apply to the case at bar, nor was the point covered by *The Queen v. Webster* (1885), 16 Q.B.D. 134. He also referred to *Regina v. Prince* (1875), L.R. 2 C.C.R. 154. On the other branch of the case, reference was made to the following authorities: *Brooks v. Mason*, [1902] 2 K.B. 743, 744; *Emary v. Nolloth*, [1903] 2 K.B. 264; *Sherras v. DeRutzen*, [1895] 1 Q.B. 918, 921; Maxwell on Interpretation of Statutes, 4th ed., pp. 146-160, where the law as to *mens rea* is summarised.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown, argued that the word “knowingly” in sec. 217 cannot be attributed to knowledge of the girl’s age, and referred to the French version of the section in support of this view. As to the second point, there is no ground for the suggested exception from the absolute prohibition in the section. In this connection, reference was made to secs. 215 and 216 (a), (g), (i).

December 31. GARROW, J.A. (after setting out the facts as above):—I would answer the first question in the negative.

The second is not so easily answered, largely because of its somewhat peculiar form. I assume, however, that what it really means is—is it an offence, within the section, for the owner of the premises to have illicit connection upon the premises with a girl within the prescribed age? And to such a question I would answer, “No.”

A somewhat similar question was recently before this Court in the case of *Rex v. Karn*, 20 O.L.R. 91, but with this vital distinction, that in that case there was, in addition to the act of the prisoner, himself the occupier of the premises, a similar act, with his knowledge, by another man with another girl.

The section is not, in my opinion, aimed at the mere act of illicit intercourse. The offence would be, I think, complete, although perhaps not easily proved, without any evidence of actual illicit intercourse, if it was established that the girl was induced or knowingly permitted to be upon the premises for the unlawful purpose. A connection with a man following is merely in the nature of evidence of the unlawful purpose. If, for instance, an owner or occupier of premises was knowingly to permit a girl to be upon his premises under an appointment made with her to there meet her paramour for the purpose of illicit connection, the offence of the owner or occupier would be complete, although the man failed to appear. And it is, of course, apparent that the statutory offence may be committed by a woman, as was the case in *The Queen v. Webster*, 16 Q.B.D. 134. The language of the section is, no doubt, purposely made wide, but its plain object is, I think, to forbid the use, either occasionally or habitually, of premises as assignation-houses, or houses of that nature, to which young girls may or may be induced to resort. The girls need not, as in sec. 211, have been of previously chaste character. They may even, for anything that appears, be leading a life of prostitution.

The section is one of a group, beginning with sec. 210 and extending to sec. 219, all concerned with a similar subject, namely, the protection of young girls and of women from the seducer. Section 211 explicitly forbids the act of illicit con-

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nection with a girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years. If the girl is over the age of sixteen years, or if she is not of previously chaste character, it is not, however morally wrong, a criminal offence to have illicit connection with her. Section 212 deals with illicit connection under promise of marriage; sec. 213, with a similar connection between a man and his ward, or an employer and his servant; sec. 214, with a similar connection between a master or other employee on board of a vessel, and a female passenger; secs. 215 and 216, with the offence of procuring; sec. 218, with conspiracy to induce a woman to commit adultery or fornication; sec. 219, with the case of illicit connection with imbeciles, etc.; and sec. 220, with the case of Indian women.

The fact that all these special cases are provided for with so much care and particularity, and the important fact that only in the one case, namely, that mentioned in sec. 211, is the mere act of illicit intercourse, in itself, and without any special circumstance except the previous chaste character, prohibited—all, to my mind, concur in leading to the conclusion that sec. 217 was never intended to apply to such a case as this. Nor is there anything in the language of the section which, read in the light of the other sections to which I have referred, compels a different construction, or, in other words, to read the “any man” as necessarily including the owner or occupier himself. The marginal note to the section, “Householder permitting defilement,” more correctly interprets its true meaning.

The questions should, therefore, be answered accordingly—that is, the first in the negative, and the second in the affirmative; and the conviction should be quashed.

MEREDITH, J.A.:—In my opinion, the prisoner should not have been convicted.

The case was not one of permitting, but was one of committing, the defilement of a girl on the premises of the prisoner.

Section 217 of the Criminal Code, under which the accusation was made and the conviction was had, relates only to persons who induce, or knowingly suffer, girls, under eighteen years, to re-

sort to, or be upon, their premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally; all of which seems to me to be inapplicable to fornication with the householder on his own premises: to be applicable to cases of permission, not commission; a view which accords with the marginal note of the enactment in question; and also with that of the Imperial enactment from which it is taken: 48 & 49 Vict. ch. 69, sec. 6, "Householder, etc., permitting defilement of young girl on his premises:" see also sec. 220 of the Criminal Code.

It would be somewhat extraordinary if any one were made guilty of a very grave crime in carnally knowing a girl upon his own premises, and yet remained not guilty of any offence if the same thing were done anywhere else: this section of the Code is surely not aimed against the carnal intercourse directly, but is aimed against houses of assignation and things of that character.

Karn's case, 20 O.L.R. 91, gives no encouragement to this prosecution: in that case the convicted man had permitted his shop to be used by another man for the immoral purpose, and so was clearly within the enactment; and his crime was surely not expiated or lessened because he also committed the immoral act there.

I am unaware, and no one yet has professed to be aware, of any other prosecution, such as this, either in Canada or in England, as long as the enactment has been in force.

The meaning of the section seems to me to be plain enough, but the most that can be said of it for the prosecution, now, is that its meaning is not certain; and is any one to be branded as a criminal and made liable to great punishment upon uncertain language?

If all this be not so, the enactment is very far-reaching in its effect; it covers cases in which, hitherto, it has been generally thought that a civil action only would lie, as well as cases to which, it has also hitherto been generally thought that, neither the civil nor the criminal law is applicable: but, if it be so, as, in my opinion, it must, then the prisoner should be discharged; and it is unnecessary to consider the other question.

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MOSS, C.J.O., concurred.

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MAGEE, J.A.:—The words of sec. 217 are in themselves wide enough to include a case where the carnal knowledge is intended to be with or by the owner or occupier himself. I do not see that there is anything in the context or the reason of the enactment to exclude such a case. If the section applied only to one who “knowingly suffered” the girl to be upon his premises for the illicit purpose, there would be more room for argument. But it is not so restricted. It applies to one who “induces” as well as one who “knowingly suffers.” They both stand on the same footing, and, unless one who induced for the purpose of carnal knowledge by himself would escape as not coming under the words “any man,” then one who knowingly suffers for the like purpose must also be taken to be included in those two words, which must be interpreted alike for both cases.

In other sections there are provisions in which, when intercourse with the criminal himself is not meant to be guarded against, the intention is expressly mentioned. Thus it is in sec. 215 a parent or guardian procuring the girl or woman to have carnal connection “with any man other than the procurer” or receiving the avails of her defilement; and sec. 216 (*a*); one procuring a girl or woman to have connection with any other person or persons. It was argued from this that, if sec. 217 had likewise intended, it would have done so. But that argument cannot carry far, as there would be reason for the exclusion in both the two previous sections mentioned. In sec. 215 the omission is guarded against elsewhere, and in sec. 216(*a*) the word “procuring” has an ordinary signification which the Legislature in that particular clause made clear it was not departing from. In clauses (*g*) and (*h*) the same word is used, but in connection with means which may take it beyond its ordinary use. But in sec. 216, clause (*b*), inveigling or enticing to a house of ill-fame or assignation for the purpose of “illicit intercourse” or prostitution, and clause (*i*) administering drugs, etc., with intent to stupefy or overpower so as thereby to enable “any person” to have unlawful carnal connection with the woman or girl, seem certainly wide enough to cover intent that the intercourse or con-

nection should be with the criminal. Section 218 would also, I think, clearly cover conspiracy by two or more accused to induce intercourse with one of them. If sec. 217 bears a like construction, it, therefore, does not stand alone. It is indeed one of a group of sections which are intended for the protection of young girls and women, and should receive no narrow construction. If we look at the history of the section, it will be more clear. It was originally sec. 4 of 49 Vict. ch. 52, and was limited to an offence in respect of girls under sixteen years, it being declared a felony and the punishment being ten years' imprisonment if the age of the girl were under twelve years, and being declared a misdemeanour and the imprisonment two years if she were of or above the age of twelve years and under fourteen years, and it was provided that it would be a defence if the accused had reasonable cause to believe the age to be sixteen years or over. By the same Act seduction and attempts at seduction of chaste girls under the age of sixteen years was made an offence. In 1890, by 53 Vict. ch. 37, sec. 3, the age of fourteen was substituted for that of twelve years. In 1892 the provision so amended was adopted in the Criminal Code, but without the provision excusing the accused on account of his belief as to the age. Then in 1900, by 63 & 64 Vict. ch. 46, the age of eighteen years was substituted for that of sixteen years. By sec. 12 of the Act of 1890 referred to, unlawful and carnal knowledge and abuse of a girl under fourteen years of age was made felony. Previously the ages had been ten and twelve years. In 1892 and 1906 this was embodied in the Criminal Code.

Now it would, I think, be an unusual thing in criminal experience that a person would entice a girl under twelve years into his or her premises for the purpose of some one else having intercourse with her, and yet the severest punishment under sec. 4 of the Act of 1886 was imposed for offences against girls of that age. Actual intercourse or attempts at actual intercourse were prohibited under other sections; but in this section enticement to the premises for the like purpose, where the acts did not yet amount to an attempt, and would not otherwise be punishable, are made so. Take the case of a man intending to make a young girl his mistress and enticing her to a room or

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house owned by him and where he intended to keep her, would not such a case come within the mischiefs intended to be covered by this section?

In *Rex v. Karn*, 20 O.L.R. 91, where the defendant had enticed two girls to his premises for illicit intercourse with himself and another, this Court held the conviction proper, and no distinction seems to have been drawn between the case of the girl intended for himself and the other. If in the case of an actual enticement the intercourse is intended to be with the enticer, and is punishable under sec. 217, because it is intended to be with "a particular man," then I see no possible way of giving a different interpretation to the words "any man" or "a particular man," if, instead of the accused being an inducer, he is one who "knowingly suffers" her to be there with the intention of having the illicit intercourse himself.

In my opinion, the second question should be answered in the negative.

The first question should also be answered in the negative. The word "knowingly" manifestly applies to the knowledge of the presence of the girl and the purpose, but not to her age; knowledge of her age is not necessary in the case of inducing, and is not more so in the case of knowingly suffering. Originally under the Act of 1886 it was made a good defence if the accused had reasonable cause to believe that she was of or above the age of sixteen years; but that provision was struck out.

The learned Judge has not, in his stated case, left open to this Court anything but the two bare questions of law. He apparently was satisfied that the accused had knowingly suffered the girl to be on his premises for the purpose of having intercourse with her. The statement of facts is meagre. It may be a case of a dissolute girl enticing an ignorant foreigner, and, if so, will, no doubt, be leniently dealt with. It may be a case of an innocent young girl going for lawful purposes to the defendant's laundry and being there induced to give consent to the intended purpose. But as to this we know nothing and have nothing to do.

MACLAREN, J.A., agreed with MAGEE, J.A.

In the result, the first question was answered in the negative, and the second (MACLAREN and MAGEE, JJ.A., dissenting) in the affirmative; and the conviction was quashed.

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[MEREDITH, C.J.C.P.]

RE ONTARIO SUGAR CO.

McKINNON'S CASE.

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Dec. 30.

Estoppel—Res Judicata—Company—Winding-up—Contributory—Action for Calls—Dismissal—Consent Judgment—Grounds for—Ascertainment—Evidence outside of Pleadings and Judgment.

The rule of the common law, "that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court," is difficult of application since the Judicature Act, by reason of the uncertainty which may exist as to what was really determined in the former suit; but, in order to ascertain whether the judgment in the former suit is a bar, the Court may look outside the judgment and the pleadings.

Ripley v. Arthur (1902), 86 L.T.R. 735, *Alison's Case* (1873), L.R. 9 Ch. 1, *Maharaja Jagatjit Singh v. Rajah Sarabjit Singh* (1891), L.R. 18 Ind. App. 165, *Amriteswari Debi v. Secretary of State for India* (1897), L.R. 24 Ind. App. 33, and *Russell v. Place* (1876), 94 U.S. 606, specially referred to.

A judgment by consent is in the same position as a judgment pronounced after the trial of an action.

In re South American and Mexican Co., Ex p. Bank of England, [1895] 1 Ch. 37, and *The Belcairn* (1885), 10 P.D. 161, followed.

An incorporated company brought an action against McK., as the holder of shares of the capital stock, to recover money alleged to be due by him in respect of calls. McK. pleaded several defences—among others, that he was not the holder of the shares, and that the calls were not duly made. The action came on for trial, and, upon consent, a judgment dismissing it was pronounced, signed, and entered. Afterwards, the company being in liquidation under a winding-up order, the liquidator sought to make McK. a contributory in respect of the same shares upon which the calls had been made:—

Held, that, as it is impossible from the pleadings and judgment to ascertain upon which of the grounds of defence McK. succeeded, the Court might look at the admissions made before the Referee in the winding-up proceedings; and those admissions, coupled with the judgment and record, warranted the conclusion that the ground upon which McK. succeeded in the action was that he was not a shareholder in the company; and, therefore, the former recovery was a bar to the claim of the liquidator, which was based upon its being established that McK. was a shareholder at the commencement of the winding-up.

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AN appeal by the liquidator of the company, in a winding-up proceeding, from the report of an Official Referee dated the 8th June, 1910, striking the name of the respondent, S. F. McKinnon, from the list of contributories.

November 17. The appeal was heard by MEREDITH, C.J.C.P., in the Weekly Court at Toronto.

W. N. Tilley, for the appellant.

J. Shilton, for the respondent.

December 30. MEREDITH, C.J.:—The question for decision is, whether or not the liquidator is estopped from alleging that the respondent is a shareholder in the company, by a judgment dated the 5th October, 1904, dismissing an action brought by the company against the respondent as the holder of the fifty shares of \$100 each of the capital stock of the company in respect of which it is sought to place him on the list of contributories, to recover \$5,000 alleged to be due by him in respect of five calls of twenty per cent. which had been made.

By his statement of defence the respondent pleaded that he was not a holder of shares in the capital stock of the company; that, at the request of one Richard Harcourt (made a third party to the action), he became a nominal applicant only for the purpose of the issue of the letters patent; and that it was "agreed by and between the other petitioners for the issue of the letters patent and the defendant and the said Richard Harcourt and with the provisional directors of the company, that the defendant should not become a holder of the said shares by reason of his joining in the application for the issue of the letters patent;" and that, by reason of certain matters alleged, to which it is unnecessary to refer, the petition, memorandum of agreement, stock-book, and letters patent, became "vitiating;" and he also pleaded that the company was not a duly incorporated company under the Ontario Companies Act, and that the calls for which he was sued had not been duly made.

Issue having been joined, the action came on for trial on the 5th October, 1904, when the judgment I have mentioned was pronounced upon consent, and the judgment was signed and entered on the 30th March, 1910.

The provision of the Indian Code of Civil Procedure as to bar by judgment is: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court:" and that is substantially the rule of the common law.

The difficulty of applying the rule is greater under the existing system of pleading than it was under the system which prevailed before the Judicature Act. As pointed out by Williams, L.J., in *Ripley v. Arthur* (1902), 86 L.T.R. 735, 736: "In days gone by, at all events at common law, when you only pleaded—whether you were plaintiff or defendant—legal results, there was very little difficulty in saying whether a matter was concluded as *res judicata* or not, because, subject to certain evidence of identity of subject-matter, you could always arrive at a conclusion by looking at the record. Now, when you tell a long story in your pleadings, whether it is a statement of claim or statement of defence, it is very difficult to say how much is evidence and how much is part of the statement of claim, or defence, as the case may be;" and he came to the conclusion that, be that as it might, "an admission by default" in pleading never admits anything beyond a minimum which is necessary to carry the judgment—adding: "If you have got a statement of claim which covers several subjects of complaint, and you have got judgment for the plaintiff, the result of the rule that I have just mentioned, of the admission not covering more than a minimum, is that you necessarily have to go to evidence to identify what was in truth and in fact the subject-matter in respect of which the plaintiff succeeded."

In *Alison's Case* (1873), L.R. 9 Ch. 1, an action had been brought by the Bank of Hindustan against Alison to recover calls upon 25 shares. The action came on for trial before Chief Justice Bovill and a special jury, and a verdict was found for the plaintiffs, subject to the opinion of the Court on a special case, which was stated and which raised the question whether or not

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Alison was a shareholder, and the decision on the special case was in his favour. Alison then applied in the winding-up for repayment of the money paid by him for shares, premium, and calls, with interest, and it was held by Lord Justice James, sitting for Vice-Chancellor Wickens, and by the Lord Justices on appeal, that the judgment in the action at law was conclusive, and an order for the repayment was made accordingly: (1873), L.R. 15 Eq. 394. Mellish, L.J., in delivering judgment, said (p. 25): "It is clear, I apprehend, that the judgment of the Courts of common law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discerned. For instance, if in this case there had been an actual verdict declaring that Alison never was a shareholder, that would have been conclusive as between the parties in all future actions and suits, as establishing that he never was a shareholder. The only real difficulty in this case arises from the judgment not in form stating on which plea the defendant should succeed, but only deciding that the company were not entitled to recover any portion of the sums they sought to recover in the action. And if the special case had left it open to the Court to decide in favour of the defendant, upon several grounds I doubt whether technically we could have looked at what was said by the Judges for the purpose of discovering what were the real grounds of their decision. But upon reading the special case, it appears to me clear that the special case raised only one single question for the opinion of the Court, namely, the question whether Alison ever became a shareholder in the Bank of Hindustan, and that therefore the judgment that the company were not entitled to recover all or any of the sums which they sought to recover in the action, is necessarily a decision also that Alison never had become a shareholder. Therefore, upon that ground, there is conclusive evidence in this case that he never became a shareholder in the bank."

In *Maharaja Jagatjit Singh v. Rajah Sarabjit Singh* (1891), L.R. 18 Ind. App. 165, 176, Lord Hobhouse, dealing with the effect, under the provisions of the Indian Code to which I have

referred, of a former decree pleaded in bar of the action, said: "And when a decree simply dismisses a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided."

Dealing with a similar question, in *Amriteswari Debi v. Secretary of State for India* (1897), L.R. 24 Ind. App. 33, 47, Lord Watson, speaking for the Judicial Committee of the Privy Council, said: "They" (*i.e.*, the Board) "cannot avoid the observation that, in the Court below, sufficient attention has not been paid to the rule that, in cases where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause."

Mr. Justice Field, delivering the judgment of the Supreme Court of the United States, in *Russell v. Place* (1876), 94 U.S. 606, after stating that "it is undoubtedly settled law that a judgment of a Court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit," went on to say: "But to this operation of the judgment it must appear, either upon the face of the record or be shewn by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence shewing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

I refer also to Caspersz on Modern Estoppel and Res Judicata, 3rd ed., part 2, pp. 48 to 51, 77 *et seq.*; Black on Judgments, 2nd ed., secs. 500, 624, 673, and 731; and to *Houstoun v. Marquis of Sligo* (1885), 29 Ch. D. 448.

That a judgment by consent is in the same position as a judgment pronounced after the trial of the action is well settled—in

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In re South American and Mexican Co., Ex p. Bank of England, [1895] 1 Ch. 37; *The Belcairn* (1885), 10 P.D. 161.

Applying the principles enunciated in the cases to which I have referred to the case at bar, it follows that the judgment in the action by the company against the respondent is not a bar to the appellant's proceedings to place the respondent on the list of contributories, unless it was determined in the action that the respondent was not liable for the calls for which he was sued because he was not a shareholder. It is impossible from the pleadings and the judgment to ascertain upon which of the grounds of the defence the respondent succeeded, and it is manifest that, if it was on the ground that the calls were not duly made, as the respondent alleged in his statement of defence, the judgment is not a bar to the appellant's proceedings.

As has been seen, the Court, for the purpose of ascertaining what was actually determined in the former action, may look outside the judgment and the pleadings; and, looking at the admissions which were made before the Referee, I find there an admission that all the calls for the recovery of which the action was brought were made as alleged in the statement of claim (admission 4), and an admission (5) that the respondent denied that he was a shareholder and refused to pay calls that were made upon him by the company as such shareholder, and that the calls were not paid.

These admissions, coupled with the judgment and record, I think warrant the conclusion that the ground upon which the respondent succeeded in the action was that he was not a shareholder in the company; and it follows from that conclusion that the former recovery is a bar to the claim of the appellant to place the respondent on the list of contributories, which is based, and necessarily so, upon its being established that the respondent was a shareholder at the commencement of the winding-up.

The appeal is dismissed with costs.

[Leave to appeal from the order of MEREDITH, C.J.C.P., to the Court of Appeal, was granted by MIDDLETON, J., on the 17th January, 1911: see 2 O.W.N. 614.]

[DIVISIONAL COURT.]

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Physicians and Surgeons—College Council—Inquiry into Alleged Misconduct of Registered Practitioner—Ontario Medical Act, R.S.O. 1897, ch. 176, secs. 33, 35, 59—Time-limit—Notice to Accused—Powers of Council—Misconduct Amounting to Indictable Offence—Acquittal by Criminal Court—"Infamous or Disgraceful Conduct in a Professional Respect"—Prohibition—Premature Application—Defence to Charge—Appeal—Powers of Provincial Legislature—Civil Rights.

The Ontario Medical Act, R.S.O. 1897, ch. 176, sec. 59, provides that "every prosecution under this Act shall be commenced within one year from the date of the alleged offence:"—

Held, that an inquiry by the Council of the College of Physicians and Surgeons of Ontario, or a committee thereof, under secs. 33 (2), 35 (1), into the alleged misconduct of a registered practitioner, is not a "prosecution," within the meaning of sec. 59, and the time-limit does not apply.

Held, also, that, although the proper two weeks' notice was not given to a registered practitioner of the meeting at which a committee of the Council intended to inquire into his alleged misconduct, the action of the committee in giving time to the practitioner, by adjourning the meeting for more than two weeks, got rid of all difficulty.

Section 33 (1) of the Act provides that "where any registered medical practitioner has . . . been convicted . . . of an offence which, if committed in Canada, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register:"—

Held, that, under this enactment, and sub-sec. 2 of sec. 33 (as amended by 10 Edw. VII. ch. 77), sub-sec. 4 of sec. 33 (added by 10 Edw. VII. ch. 77), and sec. 35, the Council has power to erase from the register the name of a practitioner for misconduct amounting to an indictable offence, although he has not been convicted of the offence; or for infamous or disgraceful conduct in a professional respect, although the act charged amounts to an indictable offence.

Held, also, by RIDDELL, J. (and by a Divisional Court, upon appeal, with some hesitation), that, where the act charged involves guilt of infamous or disgraceful conduct in a professional respect, and also amounts to a crime, and the person charged has been acquitted of the crime, the Council may, nevertheless, find him guilty of the act and cause his name to be erased from the register.

Seem, also, as to the last point, that the application of the practitioner whose conduct was in question for an order prohibiting the Council or committee from proceeding with the inquiry, was premature; for the fact of his acquittal, if an answer at all, was a defence to the charge made against him, and should be presented to the tribunal whose duty it was to make the inquiry; and, as he had the right to appeal from the decision of the Council, no injustice could be done to him.

Order of RIDDELL, J., affirmed.

Held, also, by RIDDELL, J., that the inquiry was not a criminal trial, involving punishment for the crime alleged; it was merely for the determination of facts upon which the civil rights of the accused might depend; and, therefore, the provisions of the Act above mentioned were not *ultra vires* the Provincial Legislature.

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MOTION by Albert W. Stinson for an order prohibiting the Council of the College of Physicians and Surgeons of Ontario from proceeding with an inquiry into the conduct of the applicant.

November 25, 1910. The motion was heard by RIDDELL, J., in Chambers.

E. G. Porter, K.C., for the applicant.

J. W. Curry, K.C., for the College Council.

November 29. RIDDELL, J.:—Dr. Albert W. Stinson, of Cobourg, was tried at the General Sessions of the Peace at Cobourg on the 14th December, 1909, on a charge of unlawfully using an instrument on one Emma Dale in August and September, 1909, with intent to procure a miscarriage, contrary to sec. 303 of the Criminal Code. He was acquitted.

In July, 1910, he was served by the solicitor for the College of Physicians and Surgeons of Ontario with a notice that a committee of the College Council, appointed for that purpose, would on the 16th August meet at Cobourg to inquire whether he had been guilty of any infamous or disgraceful conduct in a professional respect whereby he was liable to have his name erased from the register of the College—the particulars given, “amongst other charges,” being that he in August and September, 1909, “did perform a criminal operation upon a woman named Emma Dale, whereby she was caused to abort . . . and also that” he “at the times . . . aforesaid, with intent to procure the miscarriage of the said Emma Dale, unlawfully used on the said Emma Dale an instrument contrary to . . . section 303 of the Criminal Code.”

Further facts were brought to the attention of counsel, and, pending the return of the notice, a second notice was served upon Dr. Stinson for the same day, that, in addition to the Dale charge, he was also charged with having performed a criminal operation in April, 1909, upon Mrs. J., whereby she was caused to abort.

Dr. Stinson appeared on the 16th August at the meeting, and, without objection on his part, the evidence on the Dale charge

was gone into. The committee thought it fair to allow him time to meet the J. charge, and adjourned the meeting till the 2nd November.

Pending this adjournment another notice was served, he says, less than two weeks before the 2nd November, covering substantially the same ground as the second notice.

On the 2nd November, Dr. Stinson appeared with his counsel before the committee and took objections. The committee, after conference, informed him that they were prepared to overrule the objections, and would proceed with the investigation, unless he desired to move for prohibition, in which event they would adjourn to permit of a motion being made. Dr. Stinson undertook to move; and the meeting was adjourned till the 30th November.

A motion for prohibition is now made.

(1) The first objection is that the time for such an inquiry had elapsed, and the Ontario Medical Act, R.S.O. 1897, ch. 176, sec. 59, is relied upon: "Every prosecution under this Act shall be commenced within one year from the date of the alleged offence." "Prosecution" in this section is used in the same sense as in sec. 55, of a proceeding before a Justice or Justices of the Peace for such offences as are mentioned in secs. 47, 48(2), 49, 50, 51.

An inquiry such as this is, under secs. 33(2), 35(1), is not a "prosecution," however dire the result of such an inquiry may be to the medical man.

(2) That the proper two weeks' notice* was not given by the second and third notices may be true; but the action of the committee in giving time to Dr. Stinson, by enlarging the meeting till the 2nd November, and again till the 30th November, gets rid of all difficulty. Even if I should prohibit proceeding on these notices, a new one could be served at once, and the only effect would be to cause delay and expense.

(3) The main objection is that the acts charged are crimes, and that the Council cannot inquire into an alleged crime.

*Sec. 35 (5): At least two weeks before the first meeting of the committee to be held for taking the evidence or otherwise ascertaining the facts, a notice shall be served upon the person whose conduct is the subject of inquiry. . . .

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The argument is simple. Section 33(1) provides that, "Where any registered practitioner has . . . been convicted either in Her Majesty's dominions or elsewhere of an offence which, if committed in Canada, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register." Accordingly it is argued that the Legislature has divided the causes for removal from the register into two classes: (1) crimes which in Canada are felonies or misdemeanours; and (2) infamous or disgraceful conduct in a professional respect—the investigation of the former class is left to the criminal Courts, and it is only if and when the medical man is convicted in the criminal Courts that his name is to be removed for such cause—but over the latter the criminal Courts have no jurisdiction, therefore the Council must itself make inquiry. It is thought that sub-sec. (2) lends force to this argument, as the Council is to make inquiry, and, "on proof of such conviction or of such infamous or disgraceful conduct," cause the name to be removed.

This argument would be wholly effective if it were the fact that a hard and fast distinction can be drawn between felonies and misdemeanours on the one hand, and infamous or disgraceful conduct in a professional respect on the other. But this is not the case. The greatest crime known to our law is treason. Dr. Olivier Chenier, who was killed at St. Eustache, and Dr. Wolfred Nelson, who was banished for his actions during the troublous times of 1837, were guilty of treason—perhaps some were in the same parlous state in Upper Canada also—but no one would say that their treason was infamous or disgraceful conduct in a professional respect—no one thought the less in a professional point of view of the medical men who took part in the affairs of 1715 and 1745, although they would have received short shrift if caught—as, indeed, some of them did.

A doctor may be careless when deer-hunting and shoot his companion, thinking the object to be a deer. He may be found guilty of manslaughter—but he is not guilty of infamous or disgraceful conduct. The examples might be extended *ad libitum*.

But, on the other hand, there are many crimes which do constitute such conduct—this very crime of abortion, for example.

Again, not every piece of infamous or disgraceful conduct in a professional respect is a crime—the medical man who, called in consultation, tries to oust the attending physician, acts in a disgraceful way in a professional respect, but he is not guilty of a crime. He may, indeed, in his unprofessional endeavour, go so far as to make himself liable to an indictment for libel—but, if he is shrewd enough, he can keep on the windy side of the criminal law.

The two classes are neither mutually exclusive nor genus and species—the same act may belong to one only or to both.

The history of the legislation may be of some assistance. We may disregard the legislation before 1869. In that year was passed an Act abolishing the Regular and Homœopathic Boards, and forming the medical profession in Ontario into “The College of Physicians and Surgeons of Ontario,” with an elective—in part appointed—council. Section 35 of the Act, 32 Viet. (O.) ch. 45, provides: “Any registered medical practitioner, who shall have been convicted of any felony in any Court, shall thereby forfeit his right to registration, and, by the direction of the Council, his name shall be erased from the register . . .” It will be seen how narrow a range of misconduct was prescribed for the removal from the register of the doctor misconducting himself. He might take part in a riot and help to destroy churches, etc., and be sentenced to seven years in the penitentiary; keep arms for dangerous purposes; obtain money or goods under false pretences; sell liquor wholesale or retail without a license; riotously disturb public meetings and church services; take part as principal in a prize fight; commit perjury or suborn it at will; help convicts to escape; seduce women or be guilty of unnatural crimes; procure chaste girls to become prostitutes; and commit a whole series of crimes, the punishment for which in some instances was imprisonment for life; but, as these were by law misdemeanours, and not felonies, the Council would be helpless. Of course, the ordinary lay opinion was and is that felony is a much graver offence than misdeameanour; but such was not the law when there was a distinction between the two. Forgery was a felony, perjury was not; stealing \$5 a felony, obtaining \$1,000 by false

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pretences a misdemeanour—and there were felonies lightly punished, while there were misdemeanours which might involve a life sentence.

The next Act, that of 1874, 37 Viet. ch. 30, did not make any change in this respect—sec. 34: nor did R.S.O. 1877, ch. 142, sec. 34. Before the next revision, however, the absurdity became apparent; and 50 Viet. ch. 24, sec. 3, repealed sec. 34 of the previous revised statute, and introduced the provision as it now stands; then R.S.O. 1887, ch. 148, sec. 34, followed; and R.S.O. 1897, ch. 176, sec. 33, is *totidem verbis*—although the distinction between felonies and misdemeanours had been abolished by the Criminal Code of 1892, sec. 535, and there were no longer any felonies or misdemeanours in Canada, and all such offences as had been either had become “indictable offences.”

Before the change in 1887 a medical man might, as we have seen, commit crimes by the score without rendering himself liable to be removed from the roll—if he chose his crime with caution, he might even spend years in the penitentiary without rendering himself obnoxious to this proceeding. But more—even though he had notoriously committed crimes which were felonies, if by any means he could escape prosecution, or, if prosecuted, conviction, he was safe—it was not the commission of a crime, felony though it might be, but the conviction by the Court, which enabled the Council to act.

I am of opinion that the Legislature, in making the new provision of 50 Viet., intended to get rid of both anomalies—not only were they desirous that the commission of a misdemeanour should justify the Council in acting, but also they intended to enable the Council to act without the necessity of a conviction, if the offending act were of such a character as to be infamous or disgraceful in a professional respect—the words are not “been guilty of any ‘other’ act which would be infamous or disgraceful conduct in a professional respect.” The purport of the legislation is, that if a medical man has been publicly tried in a Court of criminal jurisdiction, and been there convicted of an indictable offence against the people, he no longer has any right to be a registered practitioner. If he has not been so convicted, the Council must inquire into the facts of any alleged misconduct;

and, if misconduct is proved, whether such misconduct be a crime or not, so long as it is infamous or disgraceful in a professional respect, it is quite the same as if the medical man had been convicted of a crime.

I do not think that the Legislature intended that the investigation of crimes of this character should be left exclusively to the criminal Courts, and that the right of a practitioner to remain upon the register when he had committed a crime should depend upon, first, whether he was prosecuted or not, and second, whether the evidence was sufficient to satisfy a jury, and the jury were firm enough to convict, when the evidence should have been considered sufficient. These are chances—no one with any experience in criminal Courts but has seen persons undoubtedly guilty escape conviction. Whatever may have been the case in sterner times, the case is now all too common in which an accused is acquitted from alleged lack of evidence or from indisposition on the part of juries to convict—pity—sympathy.

The Legislature cannot, I think, have intended that an abortionist should be able to snap his fingers at the Council, and, under the guise of a registered practitioner, continue his nefarious work—if only he has been astute or lucky enough to escape prosecution, or, if prosecuted, to escape conviction.

The legislation of 1910, 10 Edw. VII. ch. 77, sec. 2(3), seems to lend some support to the view I have indicated. This section provides that “upon receipt of proof of the finding or decision of any court of record of this Province civil or criminal, that a criminal offence has been committed in connection with the practice of his profession by any registered medical practitioner, the registrar shall immediately erase from the register the name of such practitioner.” This relieves the Council of inquiry into any criminal offence committed in connection with the practice of his profession, if a Court, whether criminal or civil, so finds against a practitioner. Before this legislation, no finding of any civil Court could relieve the Council from themselves determining the fact of such criminal offence; it was only the conviction in a criminal Court. The Legislature, to judge by this legislation, seem to have considered that the liability to have his name removed from the register would exist although no

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criminal Court has passed adversely to a practitioner upon the matter; and this legislation simplified the procedure in cases in which the matter had been passed upon in the civil Courts.

(4) This inquiry is not a criminal trial, involving punishment for the crime alleged—it is merely the determination of facts upon which the civil rights of the accused may depend—just as an inquiry under R.S.O. 1897, ch. 172, sec. 44, by the Benchers of the Law Society. This may result in disbarment (sec. 44), or suspension with loss of all privileges of a barrister-at-law (sec. 45), and being struck off the roll of solicitors (sec. 46)—a penalty similar to that to be inflicted in such a case as the present.

The objection that this is *ultra vires* of the Province is, therefore, baseless—it is not a matter of criminal law, but of civil rights.

What I have already said will dispose of the motion so far as concerns the J. inquiry.

(5) In respect of the Emma Dale inquiry there is another objection. It is argued that, an acquittal having been had in the General Sessions, the matter is concluded, and it is not open to any judicial body, such as this committee is, to inquire into it again. The maxim "*Nemo bis vexari debet pro eâdem causâ*," is appealed to—but, in cases in which the first "*vexatio*" has been in a criminal Court, the maxim must be applied with caution. No doubt, whenever any one has been acquitted upon any trial, he cannot thereafter in any criminal Court be convicted of any offence of which he might have been convicted on such first trial. But that is as far as the maxim goes.

A conviction even is not such a proceeding *in rem* as to bind everywhere. It would appear, indeed, that originally criminal convictions operated, to a certain extent at least, as judgments *in rem*; but in the modern law "a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged:" *per* Blackburn, J., in *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, at p. 434: A. L. Smith, L.J., in *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455, at p. 462 (C.A.)

In *Hathaway v. Barrow* (1807), 1 Camp. 151, it was held that the conviction of A. and B. of a conspiracy, on the prosecution of C., was not even admissible evidence in an action against them by C. In *Smith v. Rummens* (1807), 1 Camp. 9, the same ruling is found. These are both referred to by Parke, B., in *Blakemore v. Glamorganshire Canal Co.* (1835), 2 C. M. & R. 133, at p. 139.

In *Justice v. Gosling* (1852), 12 C.B. 39, an action was brought against constables, in tort, for taking the plaintiff into custody on a false and unfounded charge of furious driving—the trial Judge held that a conviction for the offence was a complete answer. The full Court considered that this was clearly wrong. There were facts in this case, however, which may deprive it of full authority for the proposition now under consideration.

In *Jones v. White* (1717), 1 Str. 68, Eyre, J., says: “A verdict on an indictment of battery cannot be read in an action for the same battery.” Whether a coroner’s inquest might be read was left open.

In *Brownsword v. Edwards* (1751), 2 Ves. Sr. 243, Lord Hardwicke, C., at p. 246, refers with approval to the decision in *Hillyard v. Grantham* (see 3 Wooddeson 318) that a proceeding in the Consistory Court against two persons for living in fornication, and sentence given against them, could not be read to prove that they were not married, for the reason, *inter alia*, that “it was a criminal matter, and could not be given in evidence in a civil cause.”

The rule in cases of acquittal is quite as unfavourable to the accused. Acquittals in criminal cases are not as a rule evidence in civil cases: Gilbert on Evidence, p. 27. As it is put in Buller’s N.P., p. 245a: “An acquittal ascertains no fact as a conviction does.”

Nor is there an estoppel.

In *Helsham v. Blackwood* (1851), 20 L.J.C.P. 187, S.C., 11 C.B. 111, the declaration set out a libel in which it was alleged that the plaintiff was tried for murder, setting out aggravating circumstances; the plea stated that the plaintiff had committed murder; and the replication to the plea was estoppel, that the plaintiff had been tried and acquitted. Jervis, C.J., said (20 L.J.C.P. at p. 191); “The course . . . taken renders it

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unnecessary for the Court to express its opinion as to the validity of the replication, although it entertains a strong opinion on that subject, which it would not wish to state without having heard Mr. Keane for the plaintiff . . .”

It must follow that no acquitted prisoner can afterwards in a civil proceeding set up by way of estoppel his acquittal, and thereby prevent the question of his guilt or innocence being gone into, if such question be material. Many examples might be given. If a libel action be brought against the publisher of a newspaper for calling a man a perjurer, the defence of justification is not met by simply proving that the plaintiff has been acquitted. A legacy is left to a named individual if he has not given way to temper and assaulted a neighbour—he is not necessarily entitled to it simply because he has succeeded in being acquitted every time he was tried—those entitled on condition broken would be allowed to prove that he had broken the condition.

The proceedings now going on are, as I have said, civil; and I think the acquittal does not stand in the way of full inquiry.

I should have much regretted to find the law different—no harm can result from the Council having power, and as a consequence a public duty, to inquire into cases of apparent crime, which would be, if proved, infamous or disgraceful conduct in a professional respect.

All cases of removal of names from the register may be submitted to the closest scrutiny by a Divisional Court, under sec. 36 of the Act, not alone those of disgraceful or infamous conduct not involving a crime—and the Court can, I venture to say, be trusted to see to it that no undue harshness is exercised against any practitioner.

That procuring an abortion and using an instrument for such purpose are not only crimes, but also infamous conduct in a professional respect, needs no argument.

I think the motion must be refused.

As to costs, the position taken by the Council has been and is wholly correct and proper. They say that, if they have jurisdiction in the premises, they, as donees of this power, which has been given for the advantage of the people at large, will exercise

the jurisdiction without flinching; while, if they have not such power, they have no desire to usurp it. I can find nothing in the proceedings taken which indicates anything but an earnest desire to do an unpleasant public duty—and the action of the Council's committee in adjourning, without further inquiry, the moment the jurisdiction was questioned, shews that there is no desire to deal harshly with the unfortunate accused—unfortunate he is, whether guilty or innocent. There is nothing made to appear why the applicant failing should not pay the costs, according to the usual rule.

The dismissal of the motion, then, will be with costs.

Albert W. Stinson appealed from the order of RIDDELL, J.

December 18, 1910. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

E. G. Porter, K.C., for the appellant. The Council and committee have no jurisdiction to try the charges or impose punishment. These are criminal charges, and are only within the jurisdiction of a Court of criminal jurisdiction, which the College or committee is not: *Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch. D. 366, at pp. 379, 383, 386; *Godson v. City of Toronto* (1890), 18 S.C.R. 36, at p. 40; *Re Squier* (1882), 46 U.C.R. 474, at p. 491; *Aslatt v. Corporation of Southampton* (1880), 16 Ch. D. 143. Proper notice of the intended inquiry was not given to the appellant under R.S.O. 1897, ch. 176, sec. 35, sub-sec. 5. The right of the respondents to enter upon it was barred by sec. 59 of the same statute. The Legislature has divided the causes for removal from the register into two classes: (1) crimes which in Canada are felonies or misdemeanours; and (2) infamous or disgraceful conduct in a professional respect. See R.S.O. 1897, ch. 176, secs. 33 and 35, and the amending Act, 10 Edw. VII. ch. 77. Under this legislation, the Council has no jurisdiction to erase from the register the name of a medical practitioner: (1) for conduct amounting to an indictable offence unless he has been convicted of the offence; or (2) for infamous or disgraceful conduct in a professional

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respect, unless the act charged does not amount to an indictable offence; and (3), even though this be not the effect of the legislation, there is no jurisdiction where the person charged has been tried for the act for which it is sought to discipline him as a criminal offence, and has been acquitted.

J. W. Curry, K.C., for the respondents. As to the want of the proper two weeks' notice under sec. 35 of the Act, I submit that the action of the committee in giving time to Dr. Stinson by enlarging the meeting till the 2nd November gets rid of that difficulty. As to the time for the inquiry having elapsed under sec. 59, I submit that an inquiry under secs. 33(2) and 35(1) is not a prosecution. As to the main objection, I would urge that no hard and fast rule can be drawn between felonies and misdemeanours, on the one hand, and infamous or disgraceful conduct in a professional respect, on the other; and that the Council has power to inquire into cases of apparent crime, which would be, if proved, infamous or disgraceful conduct in a professional respect. The appellant's acquittal does not prevent the Council investigating the charge. The appellant's rights are amply protected, as he has the right to appeal from the decision of the Council to a Divisional Court, under sec. 36 of the Act.

E. Bayly, K.C., for the Attorney-General for Ontario.

Porter, in reply.

January 3, 1911. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by Stinson from an order of Riddell, J., dated the 29th November, 1910, dismissing a motion made by the appellant for an order prohibiting the respondents from proceeding with an inquiry into and investigation of a charge made against the appellant, that he had in the months of August and September, 1909, performed a criminal operation upon a woman named Emma Dale.

On the argument we disposed of two of the grounds of the appeal, viz.: (1) that proper notice had not been given to the appellant of the intended inquiry; and (2) that the right of the respondents to enter upon it was barred by sec. 59 of the Ontario Medical Act, and expressed our agreement with the view of my learned brother as to them.

The third and the main ground of appeal remains to be dealt with.

By sec. 33 (1) of the Ontario Medical Act (R.S.O. 1897, ch. 176), it is provided that "Where any registered medical practitioner has either before or after the passing of this Act, and either before or after he is registered, been convicted either in Her Majesty's dominions or elsewhere of an offence which, if committed in Canada, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register;" and sub-sec. 2 of the same section makes provision for an inquiry being made by the Council into the case of a person alleged to be liable to have his name erased under the section, and the Council is required, on proof of the conviction or of the infamous or disgraceful conduct, to cause his name to be erased from the register.

Section 35 makes provision for the Council appointing a committee of its own body to make the inquiries necessary for the exercise of the power conferred by sec. 33, and the Council is empowered to act upon the report of the committee.

The Revised Statute was amended by 10 Edw. VII. ch. 77, by adding to sec. 33 a fourth sub-section, which reads as follows:—

"Upon receipt of proof of the finding or decision of any court of record of this Province civil or criminal, that a criminal offence has been committed in connection with the practice of his profession by any registered medical practitioner, the registrar shall immediately erase from the register the name of such practitioner;" and sub-sec. 2 of sec. 33 was amended by extending the provision as to causing inquiry to be made to the executive committee of the Council.

It is contended on behalf of the appellant that under this legislation there is no jurisdiction in the Council to erase from the register the name of a medical practitioner: (1) for conduct amounting to an indictable offence, unless he has been convicted of the offence; or (2) for infamous or disgraceful conduct in a professional respect, unless the act charged does not amount to an indictable offence; and that (3), even though

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this be not the effect of the legislation, there is no jurisdiction where the person charged has been tried for the act for which it is sought to discipline him, as a criminal offence, and has been acquitted.

The first two of these contentions, in my opinion, are not entitled to prevail. To construe the section as we are asked to do would be to read into it words which the Legislature has not used, and something which would seriously impair the effectiveness of the legislation to accomplish the purpose it was designed to serve—the removal from the register of the name of a medical practitioner who has been guilty of conduct which unfits him to remain a member of an honourable profession.

The inherent jurisdiction of the Superior Courts in England and in this Province to strike a solicitor off the rolls or to suspend him from practice is analogous to that which the Legislature has conferred upon the Council, and that jurisdiction may be exercised where the solicitor is convicted of a criminal offence, whether connected with his character as a solicitor or not; he is struck off not by way of a second punishment but because he is not a proper person to be a solicitor: Cordery on Solicitors, 3rd ed., p. 176, and cases there cited. A solicitor may also be punished by suspension or striking off the roll where the conduct is in character criminal, though no indictment has been preferred, or where the conviction has been quashed because the prisoner's admissions were wrongly received, or even where the solicitor has obtained a verdict of not guilty: *ib.*, pp. 176-7, and cases there cited.

Similar arguments to those presented by the learned counsel for the appellant were presented but unsuccessfully to the Courts in *Stephens v. Hill* (1842), 10 M. & W. 28, reported also in 1 Dowl. P.C. N.S. 669; in *In re——*, an Attorney (1864), 12 W.R. 311; and in an *Anonymous Case*, reported in the *Times* of the 15th December, 1894. I do not repeat at length the reasons given for the decisions in these cases, but I refer especially to what was said by the Chief Baron (Lord Abinger) and by Barons Alderson and Rolfe in *Stephens v. Hill*, and by Baron Pollock in the case reported in the *Times*. That was the case of an application made by the Incorporated Law Society to

strike a solicitor off the rolls, and in delivering judgment Baron Pollock said that, on principle, he did not think "that the committee, in inquiring into such a case, ought to be influenced by the sort of argument which had been urged—that if the facts were true there had been an offence against the criminal law, and that the trial ought to be in a criminal Court. "This Court," said he, "had always exercised its jurisdiction quite independently of that further question of liability to the criminal law, and the committee of the Law Society now stood in the same position as the Court for the purpose of inquiry into the facts. And the principal part of their duty is to inquire whether, upon the facts of the case, the solicitor is fit to be a member of an honourable profession and intrusted with the interests of clients."

I have found more difficulty in reaching a conclusion as to the third contention. On the first blush it strikes one that it would be unfair and contrary to the principles of British law that where the act which is charged involves guilt of infamous or disgraceful conduct in a professional respect, and also amounts to a crime, and the person charged has been acquitted of the crime, he should be liable to have his name erased from the register because he may, on an inquiry by the Council, be found guilty of the act.

My brother Riddell has presented very strong arguments in favour of the view that there is nothing to prevent such an inquiry being made and action being taken upon it, and I am not prepared to say that his conclusion is wrong. It may be that the appellant was acquitted not on the merits but on some technical ground, and in one case at least a solicitor has been struck off the rolls after his acquittal by the jury on a criminal charge based on the same matters on which the charge of misconduct was based: *In re W. H. Brown* (1882), 17 L.J. (Notes of Cases) 165.

I am inclined to think, also, that the appellant's application, as far as this last point is concerned, was premature. The fact of his acquittal, if an answer at all, is a defence to the charge that has been made against him, and should be presented to the tribunal whose duty it is to make the inquiry. It would, I think,

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be improper to stop the inquiry at the threshold; and the Court ought not to assume that, if the acquittal were an answer to the charge, the Council would not give effect to the answer when it was made to appear that the acquittal had taken place.

I have the less hesitation in affirming the order of my brother Riddell, because the appellant is entitled to appeal from the decision of the Council. As my learned brother points out, the appellate Court may be depended upon to see that no injustice is done to the appellant.

I would dismiss the appeal with costs.

[MEREDITH, C.J.C.P.]

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—
Jan. 4.

Damages—Fraud and Misrepresentation—Sale of Creameries—Measure of Damages—Difference between Purchase-price and Fair Value—Loss of Profits in Operation by Purchasers—Finding of Fair Value—Evidence—Appeal—Loss in Operation in Year Preceding Sale—Proof—Destruction of Books—Omnia Præsumuntur contra Spoliatorem.

The plaintiffs alleged that they were induced to purchase from the defendant two creameries, relying upon certain representations of the defendant and his agent as to the output, expenses, and profits of the creameries for the year 1904-5, which were, as they alleged, false and fraudulent. By the judgment in the action, a reference was directed to ascertain and state what damages, if any, the plaintiffs had sustained by reason of the fraud referred to in the pleadings:—

Held, that the true measure of the damages was the difference between the purchase-price of the creameries and their actual value at the time they were purchased; and that damages for the loss sustained by the plaintiffs in the operation of the creameries should not have been allowed by the Master upon the reference.

Review of English and American authorities.

The purchase-price of the creameries was \$4,830, and the Master found that their fair value at the time of the purchase was \$900, and he assessed the damages (irrespective of loss in operation) at \$3,930, the difference between these two sums, and interest thereon from the date of payment of the purchase-price:—

Held, upon the evidence, that the creameries had no value as creameries at the time they were sold to the plaintiffs, and that there was no reason to differ from the finding of the Master that \$900 was the fair value of the land, buildings, and machinery.

Held, also, upon the evidence that, instead of a profit as was represented, there was a considerable loss in operating the creameries in 1904-5. To shew this, the plaintiffs were not obliged to trace to the last pound the quantity of butter that went out from the two creameries; there would have been no doubt as to that matter, had the books of the defendant not been destroyed; and the plaintiffs were warranted in invoking the maxim *omnia præsumuntur contra spoliatorem*.

Report of the Master affirmed, except as to the damages for loss in operation.

THIS was an appeal by the defendant from the report of the Local Master at Woodstock dated the 8th September, 1909, made in pursuance of a reference directed by the judgment of the Court of Appeal dated the 30th June, 1908.

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The reference directed by the judgment was "to ascertain and state what damages, if any, the plaintiffs have sustained by reason of the fraud referred to in the pleadings."

The fraud referred to in the pleadings was in respect of two creameries, which the plaintiffs alleged they were induced to purchase, relying upon certain representations of the defendant and his agent as to the output, expenses, and profits of the creameries, which for the year 1904-5, which were, as they alleged, false and fraudulent.

The purchase-price was not stated in the pleadings, but from the report it appeared that it was \$4,830.

The Master found that the value of one of the creameries was \$367.50, and of the other \$532.50, and allowed as damages the difference between the aggregate of these two sums and the purchase-money, viz., \$3,930, with interest at five per cent. per annum, amounting to \$715.05.

The Master also allowed as damages \$3,440.14, which he ascertained to be the loss sustained by the plaintiffs in the operation of the creameries by them after the purchase.

October 21, 1909. The appeal was heard by MEREDITH, C.J. C.P., in the Weekly Court at Toronto.

G. H. Watson, K.C., and *A. G. Campbell*, for the appellant.
J. G. Wallace, K.C., for the respondents.

November 16, 1909. MEREDITH, C.J. (after setting out the facts as above):—The contention of the appellant is that the true measure of the damages is the difference between the purchase-price of the creameries and their actual value at the time they were purchased, and that, so measured, the damages awarded are excessive, and that the Master erred in allowing damages for the loss sustained by the respondents in the operation of the creameries.

I am of opinion that the contention of the appellant as to

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the true measure of the damages is entitled to prevail, and that the report, in so far as it allows damages for the loss sustained by the respondents in the operation of the creameries, must be set aside.

In Kerr on Fraud, 3rd ed., pp. 375-6, the statement as to the measure of damages in actions of deceit is in the main in accordance with the contention of the appellant, though the writer erroneously, I think, speaks of it as being "the difference between the actual value of the property and its value if the property had been what it was represented to be."

The statement in Mayne on Damages, 8th ed., p. 237, as to the measure of damages in such actions, is substantially the same.

In *Peek v. Derry* (1887), 37 Ch. D. 541, a case of shares, Cotton, L.J., p. 578, said: "The defendants are liable . . . for any loss which he (*i.e.*, the plaintiff) has sustained by taking the shares, and that will be the difference between the sum given for the shares, £4,000, and the value of the shares;" and in that view Sir J. Hannen and Lopes, L.J., agreed. See also the judgments at pp. 591 to 594.

In *Broome v. Speak*, [1903] 1 Ch. 586, Buckley, J., spoke of the measure of damages as well fixed, and as being the difference between the price the plaintiff paid for the thing and the fair value of the thing at the date he got it: p. 605.

Tomlin v. Luce (1899), 43 Ch. D. 191, may also be referred to.

Mr. Wallace, in support of the ruling of the Master, relied on *Smith v. Bolles* (1889), 132 U.S. 125, and *Crater v. Binninger* (1869), 33 N.J. Law 513.

Smith v. Bolles does not support the ruling. The Court was there dealing with the charge to the jury in the Court below, which was that "the measure of recovery is generally the difference between the contract-price and the reasonable market value, if the property had been as represented to be . . ." This direction was held to be erroneous, and it was said by the Chief Justice that "the reasonable market value, if the property had been as represented, afforded . . . no proper element of recovery:" pp. 129, 130.

In Sedgwick on Damages, 8th ed., vol. 2, sec. 778, it is said that the Supreme Court of the United States, in *Smith v. Bolles*, refused to follow the well-established rule that the measure of damages in an action for breach of warranty is "the difference between the value of the article sold and the value of such an article as it was represented to be;" and held that the measure of damages in an action of tort for fraud is not the same as upon breach of warranty, but is "compensation for the injury done by the fraud, that is, the purchase-money, less the actual value of the stock." The writer goes on to discuss and to criticise the *ratio decidendi* of this case, and in sec. 779 refers to the English rule, citing the opinions of Cotton, L.J., and Sir James Hannen in *Peek v. Derry*, and in secs. 780 and 781 discusses the results of the doctrine of *Smith v. Bolles*.

The ruling in *Smith v. Bolles* was considered in the United States Circuit Court of the District of Minnesota, *Atwater v. Whiteman* (1890), 41 Fed. Repr. 427, and in the United States Circuit Court of the District of North Dakota, *Glaspell v. Northern Pacific R. Co.* (1890), 43 Fed. Repr. 900. In the earlier of these cases, both of which related to land, it was held, following the ruling in *Smith v. Bolles*, that the proper instruction to the jury was "to find the fair cash value of the land in the condition it actually was when the conveyance thereof was made, and to deduct such value from the sum of money invested by the plaintiff in the land, and the difference, with interest added at the discretion of the jury, would be the amount to which the plaintiff was entitled;" and in the later case there was substantially the same holding as to the proper direction to the jury as to the measure of damages.

The same rule is applied in the Court of Appeals of Maryland: see *Buschman v. Codd* (1879), 52 Md. 202.

In *Crater v. Binninger*, *supra*, the case was treated as having peculiar characteristics which required "a modification of the ordinary rule by which damages are measured in cases of fraudulent sales," and that rule, which the Chief Justice speaks of as "the general and well-established rule," is stated by him to be, "where the sale itself is the product of fraud, the vendee may either repudiate the contract, or claim, by way of damage,

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the difference between the price paid and the real value of the property which he has acquired."

Barley v. Walford (1846), 15 L.J. Q.B. 369, was not a case between vendor and purchaser, and has therefore no application.

The result is, that the damages must be reduced to \$4,645.05, and the report be varied accordingly, unless the appellant desires that further argument be had as to the findings as to the actual value of the creameries, and in that case the motion may be set down for that purpose.

If further argument is not desired, the costs of the appeal will be costs in the cause to the appellant.

December 16, 1909. Further argument was heard by MEREDITH, C.J., in the Weekly Court.

The same counsel appeared.

January 4, 1911. MEREDITH, C.J.:—I have already dealt with the appeal as to the proper measure of damages; and there remains to be determined the main question as to whether or not a case was made by the respondents entitling them to any damages.

The action is brought for the rescission of a contract made in August, 1905, for the purchase by the respondents from the appellant of two creameries, called respectively "Kenilworth" and "Springbank," and to recover back the purchase-money which had been paid when the conveyance of the creameries was made, on the ground that the contract was entered into by the respondents relying on certain false and fraudulent representations made by the appellant as to the output, expenses, and profits of the creameries for the years 1904 and 1905; and the respondents also claimed damages for the loss sustained by them in operating the creameries in the year 1906, and further and other relief.

The action was tried before the Chancellor without a jury, and on the 10th June, 1907, he pronounced judgment dismissing the action without costs; 10 O.W.R. 190.

The respondents appealed from that judgment to a Divi-

sional Court, which affirmed it: (1907), 10 O.W.R. 883; and they then appealed to the Court of Appeal, and that Court reversed the judgment of the Chancellor, and "ordered and adjudged that it be referred to the Local Master at Woodstock to ascertain and state what damages, if any, the plaintiffs have sustained by reason of the fraud referred to in the pleadings, and that further directions and all other questions of costs be reserved until the Master shall have made his report:" (1908), 12 O.W.R. 481; and it was under that order that the report appealed from was made.

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The proper measure of damages has been determined to be the difference between the price paid for the creameries and their fair value at the time of the purchase.

The purchase-price was \$4,830, and the Master has found the fair value at the time of the purchase of the Kenilworth creamery to have been \$367.50, and of the Springbank creamery \$532.50, and he has assessed the damages at the difference between the aggregate of these two sums and the purchase-price—\$3,930—with interest at five per cent. per annum from the 12th January, 1906, to the date of the report, amounting to \$715.65; and he also allowed as damages the loss sustained by the respondents in operating the creameries, the latter item being the one with which I have already dealt.

I see no reason for differing from the view of the Master as to the fair value of the land, buildings, and machinery, assuming that the creameries were valueless as creameries.

It is undoubted, I think—to whatever cause it may properly be attributed—that the result of the respondents' operation of the creameries shewed that they were valueless as creameries.

After a careful perusal and consideration of the testimony, I have come to the conclusion that, apart altogether from any evidence as to the actual results of the operation of them in 1904 or 1905, sufficient appears to warrant the conclusion of the Master that the creameries had no value as creameries at the time they were sold to the respondents, and that the conduct of the appellant and his associates in the transaction which led to their purchase, as disclosed in the evidence, is cogent evidence of the fact.

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If it were not so, why did they resort to the fraudulent means which they adopted to put them off upon the respondents? Why was it necessary to fabricate the fraudulent statement which was prepared by Smith, and which it was pretended was an accurate statement of what the books of the creameries shewed? Why were these books destroyed? What meant the anxiety of Smith that the sale to the respondents should not fall through? What meant the letter of the 22nd October, 1905, from Archibald Smith to his brother Frederick? What the request in that letter to "do everything possible to close the sale before the patrons' meeting, as otherwise you might get landed with the factory and the ill-will of the farmers, and we would be in a worse mess than ever?" And what the following statement in it: "The prediction of Madame DeLarmar may come true, although they could hardly be called 'going concerns,' could they? For it is very doubtful if they will ever go very successfully in the future. It is almost impossible to put my mind on my work until I hear how you make out with Lawrence and Lamont. I don't seem to be able to think of anything else. I'm almost afraid to open your letters for fear of hearing that they have gone back on their offer." And what means this extract from the letter of the defendant to Archibald Smith, of the 16th March, 1906: "I feel that to assist you and Fred in making the sale of these properties I stretched my conscience fully hard enough without doing these parties out of what they have a moral right to now?" And the statement in the appellant's letter to Archibald Smith, of the 19th March, 1906: "I am now out of the creamery business, and I hope for all time to come . . . There was a time when it was a pleasure to make yearly comparisons, etc., and to look over my creamery records, but this last two years' experience, through the keen competition and indifferent makers, changed this pleasure to disgust."

And yet, in the face of all this, the appellant has now the effrontery to assert that these creameries were valuable properties, and were, up to the time of the sale, yielding a fair profit to the owners of them, and to seek to fasten on the respondents, who were tricked into buying them by fraudulent

representations, the responsibility for the failure that has attended the operation of them in their hands.

The respondents, however, endeavoured to strengthen their case by proving the actual results of the operation of the two creameries in the years 1904 and 1905, and to that end gave evidence of the shipments that were made by railway and of the quantity of buttermilk sold in those years—the quantity of buttermilk produced being apparently a fair index of the quantity of butter manufactured.

While it is true that there was some butter manufactured that was not shipped by railway, and that there was some leakage in the pipes by which the buttermilk was conveyed from the factory, a perusal of the evidence satisfies me that, making every reasonable allowance on this account, it was sufficiently established that there was, instead of a profit as was represented, a very considerable loss in operating the Springbank creamery both in 1904 and 1905, and a large loss in operating the Kenilworth creamery in 1905, if not also in 1904.

It would be a mockery of justice if, in such a case as this, the respondents must fail in obtaining redress for the wrong that has been done them, unless they are able to trace to the last pound the quantity of butter that went out from the two creameries. That was a matter within the knowledge of the appellant or his associates. There would have been no doubt as to it, had the books which shewed the results of the operation of the creameries not been destroyed; and the respondents are well warranted in invoking in aid of their case the maxim *omnia præsumuntur contra spoliatores*, a maxim which has been rigorously applied in cases such as this: Broom's Legal Maxims, 6th ed., p. 892 et seq., and cases there cited.

The appeal, in my opinion, fails, and should be dismissed.

As the appellant succeeded as to the claim for damages for the loss of operating the factories, the respondents should have only three-fourths of their costs of the appeal, and should pay one-fourth of the appellant's costs of it.

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APPENDIX I.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

At a meeting of the Supreme Court of Judicature for Ontario held on Saturday the 19th day of December, 1908, it was ordered that the following amendments to the Rules be adopted, viz. :—

Rule 412, as enacted by Rule 1229, is hereby repealed and the following substituted therefor :—

1302. (1) Money shall be paid out of Court upon the cheque of the Accountant countersigned by the Registrar of the Court of Appeal or by one of the Junior Registrars of the High Court of Justice; and the Finance Committee of the Supreme Court shall regulate the times during which such officers shall respectively perform that duty and may make regulations as to the manner in which it shall be performed.

(2) This Rule shall take effect forthwith without being published in the Ontario Gazette.

1303. Ordered that Rule 806 be amended by striking out the words “and in demy-quarto form” in the third line and the word “small” in the fourth line.

RULE PASSED 23RD APRIL, 1910.

(Promulgated 31st December, 1910.)

1304. Any condition precedent the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant shall be implied in his pleading.

RULES PASSED 24TH DECEMBER, 1910.

(Promulgated 31st December, 1910.)

1305. Rule 806, as amended by Rules 1277 and 1303, is hereby repealed, and the following substituted therefor:—

(1) The Appeal Book shall, when a printed book is necessary be printed in accordance with the rules in Schedule A hereto, and, unless these rules are complied with, shall not be received without the leave of a Judge.

(2) If the press has not been carefully corrected, the Court in its discretion may (a) disallow the cost of printing; (b) decline to hear the appeal; or (c) make such order as to postponement and payment of costs as may seem just.

(3) In the Appeal Book there shall not be any unnecessary repetition of headings and documents; and parts of documents that are not relevant to the subject-matter of the appeal, or are merely formal, shall not be printed at length, but any document not printed shall be referred to in its appropriate place in the book.

(4) When one party objects to the printing of any document, or part of document, upon the ground that it is not necessary, and the other party insists upon it being printed, it shall be printed with a note indicating that it is printed at the instance of that party, and if upon taxation it is found that the printing was unnecessary, the cost of such printing shall be disallowed to, and in any event shall be paid by the party at whose instance it was printed.

(5) When a book is printed in form suitable for use upon an appeal to His Majesty in Council, 50 copies, and in all other cases 30 copies, in sheet form unbound, shall be deposited with the Registrar for use upon any further appeal, in addition to eleven bound copies for the use of the Court.

SCHEDULE A.—RULES AS TO PRINTING.

1. The book shall be printed upon both sides of the paper, which shall be of good quality, not less than 60 pounds to the ream.

2. The sheet when folded and trimmed shall be 11 inches long and $8\frac{1}{2}$ inches wide.

3. The type in the text shall be pica, but long primer shall be used in printing accounts, tabular matter and notes.

4. The number of lines on each page shall be 47, as nearly as may be, exclusive of headlines, each line to be $5\frac{3}{4}$ inches in length, exclusive of marginal notes, and every tenth line on each page shall be numbered in the margin, and the outer margin shall be one and one-half inches wide.

5. The books shall be bound in paper, not less than 65 pounds to the ream, and the backs shall be reinforced with cloth.

6. In cases in which an appeal lies to His Majesty in Council, and in any other case in which the parties so agree or a Judge upon the application of either party so directs, marginal notes, such as are required upon an appeal to His Majesty in Council, shall be printed.

7. In other cases there shall be a headline on each page of evidence, giving the name of the witness and stating whether the evidence is on examination-in-chief, cross-examination, or as the case may be, and answers shall follow the questions immediately and not commence a separate line.

8. All exhibits shall be grouped, and be printed in chronological order.

9. At the beginning of the book there shall be an index setting out in detail the contents of the book in four parts, as follows:—

Part 1. A statement of the case and each pleading, order or other document in chronological order, with its date.

Part 2. Each witness by name, stating whether for plaintiff or defendant, examination-in-chief or cross-examination, or as the case may be.

Part 3. Each exhibit, with its description, date and number in the order of filing.

Part 4. All judgments in the Courts below, with the reasons for judgment, and the name of the Judge delivering the same, and the reasons for and against appeal.

10. The name of the Court, Judge or Official appealed from shall be stated on the cover and title page.

11. The book shall contain the date of the first proceeding and of the delivery of the several pleadings, but the style of the cause shall not be repeated.

12. Disbursements reasonably and properly incurred for printing Appeal Books in the form prescribed by these Rules shall be allowed.

1306. Rule 748 and Form 78 are hereby repealed and the following enacted in lieu thereof:—

748. The Master before he proceeds to hear and determine shall require an appointment according to Form No. 78 to be served upon all persons made parties before the judgment appearing to have any lien, charge or incumbrance upon the lands in question, subject to the plaintiff's mortgage, and shall in the notice to the other parties interested, required by Rule 658, state the names and nature of the claims of those so notified, and of those added under the provisions of Rule 746 as appearing to have a lien, charge or incumbrance upon the said lands. Such notice may be in the Form 78a.

Form 78. *Notice to parties by writ having incumbrances.*

(Court and Cause.)

Having been directed by the judgment in this action to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in question in this action subsequent to the plaintiff's claim, and to take an account of the amount due to the plaintiff and any such person. And it having been made to appear that you may have some lien, charge or incumbrance thereon you are hereby notified that I have appointed day, the day of next at my chambers in the Court House at at o'clock to proceed with the said inquiry and to determine the amount of the claim of the plaintiff, and of such incumbrancers as may come in and prove their claims before me.

If you fail to attend upon such appointment, and to prove your claim, the reference may proceed in your absence, and you will receive no further notice of the proceedings in this action,

and you will be treated as disclaiming any lien, charge or incumbrance upon the said lands, and will stand foreclosed from any such claim.

Dated this day of , 19 .

W. L., Master.

Form 78a. *Notice to original defendants other than incumbrancers.*

(Court and Cause.)

Having been directed by the judgment in this action to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in question in this action subject to the plaintiff's claim thereon.

You are hereby notified that it has been made to appear to me that the persons named in the schedule hereto may have some lien, charge or incumbrance thereon, and I have, therefore, caused such of them as are not already parties thereto to be added as parties in my office, and have appointed day, the day of , next at my chambers in the Court House at at o'clock, to inquire and determine whether the said parties have any such lien, charge or incumbrance, and to fix and ascertain the amount thereof, and the amount of the plaintiff's claim upon his security.

If you do not then and there attend, the reference will be proceeded with in your absence, and you will receive no further notice of the proceedings in this action.

Dated this day of , 19 .

W. L., Master.

SCHEDULE.

Incumbrancer		Nature of claim,
	{ A.B.	Mortgage dated.
E.g.	{ C.D.	Execution.
	{ E.F.	Mechanics lien.

1307. Rule 777, as amended by Rule 1278, is further amended by adding the words "or matter" after the word "action," where it first occurs in sub-section (1) of Rule 777.

RULES PASSED 4TH MARCH, 1911.

1308. Rule 42 is hereby amended by striking out paragraph 11 and substituting therefor the following:—

11. Applications respecting the guardianship of the person of infants and for the sale, lease, or mortgage of the property of infants.

1309. Rule 960 is hereby repealed and the following substituted therefor:

960. All applications for the sale, mortgage, or lease of an infant's estate shall be made to a Judge in Chambers.

1310. Rule 965 is amended by striking out the words "or the Master in Chambers or other officer," in the first and second lines.

1311. Rule 966 (1) is amended by striking out the words "Master in Chambers or other officer."

Rule 966 (2) is amended by striking out the words "or other officer."

1312. Rule 968 is amended by striking out the words "or other officer."

1313. All judgments and orders directing payment of costs shall direct payment to the party entitled to receive the same and not to his solicitor.

1314. When costs are directed to be paid out of money in Court, the solicitor of the party entitled to receive the same shall be entitled to have the cheque drawn in his favour upon filing with the accountant an affidavit stating, (a) that he is the party entitled to receive such costs, and (b) that he has not been paid his costs or any part thereof and that the costs, payment of which is sought, are justly due to him. If the solicitor has been changed in the course of the litigation, this fact shall be shewn by the affidavit, and the consent of both solicitors shall be filed.

1315. When money to which an infant is entitled is paid into a County Court, the clerk of the said County Court shall forthwith cause the same to be transmitted to the accountant with a statement shewing when the money was so paid in and a copy (certified by the said clerk) of all judgments or orders affecting the same; and the said money shall thereupon be placed to the credit of the said infant and shall be paid out to him with accrued interest on his attaining his majority without further order, unless in the meantime a Judge of the High Court shall otherwise order.

1316. When money is paid into Court under the order of a Surrogate Judge to the credit of an infant, it shall be paid out of Court to him with accrued interest without further order upon his attaining his majority.

1317. Rule 695 is amended by adding the following:

(3) When money is paid to the joint credit of the accountant and the party entitled, the accountant shall sign the cheque for payment out upon the production of the consent of the party paying in, duly verified, or of his solicitor, or in the absence of such consent upon the order of a Judge.

1318. Sub-sections (a) and (b) of Rule 750, as enacted by Rule 1263, are hereby repealed.

1319. Rule 824 is amended by inserting after the word "Canada" in the first line, the words "or to His Majesty in His Privy Council."

APPENDIX II.

Cases reported in the Ontario Law Reports and Ontario Weekly Notes decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada, reported since the publication of volume 21 Ontario Law Reports:—

ONTARIO BANK, RE—BANK OF MONTREAL'S CLAIM, 21 O.L.R. 1, affirmed by the Judicial Committee: MCFARLAND V. BANK OF MONTREAL, [1911] A.C. 96.

RODD V. COUNTY OF ESSEX, 19 O.L.R. 659, affirmed by the Supreme Court of Canada: RODD V. COUNTY OF ESSEX, 44 S.C.R. 137.

SOVEREIGN BANK OF CANADA V. MCINTYRE, 1 O.W.N. 254, reversed by the Supreme Court of Canada: SOVEREIGN BANK OF CANADA V. MCINTYRE, 44 S.C.R. 157.

STUART V. BANK OF MONTREAL, 17 O.L.R. 436, was reversed by the Supreme Court of Canada, 41 S.C.R. 516, and the judgment of that Court was affirmed by the Judicial Committee, for different reasons: BANK OF MONTREAL V. STUART, [1911] A.C. 120.

THOMPSON V. EQUITY FIRE INSURANCE CO., 17 O.L.R. 214, reversed by the Supreme Court of Canada (Equity Fire Insurance Co. v. Thompson, 41 S.C.R. 491), restored by the Judicial Committee: THOMPSON V. EQUITY FIRE INSURANCE CO., [1910] A.C. 592.

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ABUSE OF PROCESS OF COURT.

See EXECUTION.

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ANTE-NUPTIAL AGREEMENT.

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APPEAL.

Right of Appeal to Court of Appeal—Amount in Controversy—Judicature Act, sec. 76 (1) (b)—Mortgage Action—Costs—Motion to Quash Appeal—Practice—Judicature Act, sec. 51.—Where the respondent seeks to invoke the power of the Court of Appeal under sec. 51 of the Judicature Act, the proper practice is to move the Court to quash the appeal at the earliest moment after it has been lodged. Upon the motion

coming on to be heard, the Court may direct the motion to stand for argument along with the appeal. But it is equally proper, and sometimes more convenient and less expensive to the parties, to dispose of it when brought on pursuant to the notice. And where, before the time for entering the appeal for hearing at the September sittings of the Court had elapsed, *i.e.*, on the 10th August, the respondents served notice of motion to quash, returnable on the first day of the sittings, the Court heard and granted the motion; *MEREDITH, J.A.*, dissenting.—*International Wrecking Co. v. Lobb* (1887), 12 P.R. 207, followed.—*Per MEREDITH, J.A.*, that, as the appellant had failed to set his proposed appeal down for hearing, there was no appeal to quash; and that, as sec. 51 does not provide for a motion to quash, the Court has no power to create a practice providing for such a motion.—The appeal was from an order of a Divisional Court, and it was quashed upon the ground that the sum in controversy was less than the sum or value of \$1,000, exclusive of costs: *Judicature Act, sec. 76 (1) (b)*. And *held, per curiam*, that the word “costs” in that section means the costs incurred in the litigation; and, although the costs of a mortgage action stand on a different footing, speaking generally, from the costs of other actions, the costs taxed to the mort-

gagees by the Master, and included in his report in an action for foreclosure, were to be excluded in ascertaining the amount in controversy upon an appeal from an order varying that report. *Federal Life Assurance Co. v. Siddall*, 96.

See COMPANY, 1—COSTS—DAMAGES, 1—DISMISSAL OF ACTION—FATAL ACCIDENTS ACT—JUDGMENT—PHYSICIANS AND SURGEONS—STATUTES—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER, 2.

APPEARANCE.

See SALE OF GOODS.

ARBITRATION AND AWARD.

Dominion Railway Act—Award under—Enforcement by Summary Order under Ontario Arbitration Act, sec. 14—Arbitrators—Omission to Name Day for Making Award—Statutory Provision—Waiver.]—The Ontario Arbitration Act, 9 Edw. VII. ch. 35, sec. 14, applies to awards under the Dominion Railway Act so as to confer jurisdiction upon the High Court to entertain summary applications to enforce such awards. The Dominion Act provides for appeals, but does not provide machinery for the enforcement of awards; the Provincial Act applies to all awards where the particular Act does not provide machinery for enforcement.—The omission of arbitrators to name a day before which the award is to be made (sec. 204 of the Dominion Railway Act) does not invalidate the award; naming a day is not a condition precedent to jurisdiction; the

ascertaining of the sum offered as that to be paid results from failure to award within a time fixed, and not from failure to fix a time; the statutory provision is one in favour of the railway company, and is waived by proceeding with the arbitration. *Re Horseshoe Quarry Co. and St. Mary's and Western Ontario R.W. Co.*, 429.

ARREST.

See CRIMINAL LAW, 5—MALICIOUS ARREST.

ASSESSMENT AND TAXES.

Distress for Taxes—Seizure of Goods on Premises of Person Taxed—Claim of Title through Person Taxed—Assessment Act, 1904, sec. 103—Action against Tax Collector—Validity of Appointment—Resolution of Municipal Council—Municipal Act, 1903, secs. 295, 321, 395—Position of de Facto Officer.]—A., the owner of a mare, transferred her to the plaintiff to hold as security for the protection of certain persons against their liability upon a promissory note which they had indorsed for A. The arrangement was evidenced by a document recorded under the Act respecting Bills of Sale and Chattel Mortgages. A. agreed to care for and exercise the mare, and was to at liberty to enter her at the races. She was then removed from his premises and boarded at a hotel stable. When out for exercise A. took her upon his premises for a temporary purpose, and she was then distrained by the defendant, a tax collector, for municipal taxes due by A. in respect of his premises, and was

ultimately sold—the proceeds being paid to the municipality:—*Held*, that, the mare being upon A.'s land, and the plaintiff claiming title through A., the person taxed, the defendant had the right to take her: Assessment Act, 4 Edw. VII. ch. 23, sec. 103.—The defendant's appointment as tax collector was by resolution, not by by-law, of the municipal council:—*Held*, that the defendant was duly appointed.—Section 325 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, providing that the powers of the council shall be exercised by by-law, refers to the exercise of municipal legislative power, and not to the performance of a statutory duty. Under sec. 295 it is the duty of the council annually to appoint assessors and collectors; and there is no reason why this duty should not be discharged in any way indicating corporate action, *e.g.*, by resolution.—The effect of sec. 321 of the Act, and the position of a *de facto* officer of a municipality, when his actions are directly attacked in proceedings against him personally, referred to but not determined. *Foster v. Reno*, 413.

ASSIGNMENTS AND PREFERENCES.

1. *Assignment for Benefit of Creditors—Goods Seized by Sheriff—Interpleader—Claim of Assignee—Rights of Interpleading Creditors—Priority—Assignments and Preferences Act, sec. 14—Creditors' Relief Act, 9 Edw. VII. ch. 48, 6, sub-sec. 4—Status of Assignee.*—The company transferred goods by bill of sale to A. on the 2nd July, 1909. Seizure

having subsequently been made by a Sheriff, under certain executions against the company, of the goods transferred to A., and A. having made a claim, an interpleader issue was directed on the 10th May, 1910. This was determined against the claim of A. on the 30th September, 1910, by a judgment which, in effect, declared that A. held the goods subject to the executions against the company. On the 4th October the final order of interpleader was made, setting forth that the Sheriff, in lieu of selling the goods, had, at the request of A. and the company, continued in possession pending the trial of the issue, and directing the Sheriff to sell the goods, and out of the proceeds to pay the executions, costs and expenses—"the said creditors having a special lien therefor." On the 8th October the company made a general assignment to M. for the benefit of creditors, under the Assignments and Preferences Act, and a confirmatory assignment on the 13th October. A. transferred the assets to another company, by an instrument dated the 1st October, and that company transferred to the company in question by an instrument of the same date, but it was admitted that these instruments were not in fact executed until after the general assignment and confirmatory assignment. M. made a demand upon the Sheriff for the property in his hands, and the Sheriff applied for an interpleader order as between M. and the execution creditors:—*Held*, that the special provisions of the Creditors' Relief Act, 9 Edw. VII. ch. 48, sec.

6, sub-secs. 4 and 5, in favour of interpleading creditors, were to be regarded as an exception to the general law regarding the ratable distribution of assets, either under the Creditors' Relief Act or the Assignments and Preferences Act; and that the execution creditors were entitled as against M. to the priority given them by the former order.—History of the legislation and review of the authorities.—*Held*, also, that nothing passed by the assignment to M. but a potential right to vacate, by proper means, the transfer to A., which had already been declared fraudulent as against the interpleading creditors; and the voluntary retransfer by A. did not put the assignee, M., in any better position as regards those creditors. The transfer by the company to A. was valid as between them, and the title and property were out of the company altogether. The circumstances of the case withdrew it from the scope of the Assignments and Preferences Act, 10 Edw. VII. ch. 64, sec. 14, which applies to goods of the insolvent validly assigned to the assignee under the Act. The goods were not those of the company at the time of the assignment, and the assignee could not take a better title as against the interpleading creditors than A. could give.—Judgment of CLUTE, J., affirmed. *Re Henderson Roller Bearings Limited*, 306.

2. *Chattel Mortgage—Assignment of Book-debts—Money Advanced to Insolvent Company to Pay one Creditor—Preference—Intent to Hinder and Delay*—13 Eliz. ch. 5—*Assignments and Preferences Act, sec.*

2, sub-sec. 1—*Book-debts Restored to Company—Laches—Subrogation to Rights of Creditor.*—The defendant company, an incorporated trading company, being pressed for payment of debts by a bank and other creditors, the directors decided to raise money by chattel mortgage. The bank held as security for their advances to the company an assignment of the book-debts of the company, a bond for \$5,000 given by J., the secretary of the company personally, and the latter's indorsement of certain promissory notes discounted for the company. J.'s brother, the defendant A., who was employed by J., received from J. a cheque drawn by a third person in favour of A., for \$7,000, which A. indorsed and handed back to J., who deposited it to A.'s credit in the bank on the 3rd August, 1909. The money represented by this cheque was obtained by J. on his own note, without the knowledge of A. On the 12th August, 1909, the company made a chattel mortgage and assignment of book-debts in favour of A. for \$8,300, covering all their personal property. On the 13th August A. gave a cheque to the defendant company for \$8,300, which was deposited to the company's credit in the bank, and on the same day the company gave a cheque to the bank for \$2,254.50, being the full amount of the company's debt to the bank. On the 14th August there was a further deposit to the credit of A.'s account in the bank of \$1,000, of which a part was obtained from J. and the balance borrowed from another source. On the

7th September, 1909, the bank assigned to A. all their interest in the book-debts of the company, the assignment purporting to be in consideration of \$8,254.52 paid by A.:—*Held*, upon the evidence, that, at the time the chattel mortgage was given, the company were insolvent; that J. knew and A. knew or ought to have known of the insolvency; that the effect of the transaction was to give the bank a preference and indirectly to benefit J., who was security to the bank; and that it was done with this object in view.—*Held*, therefore, that the intent to delay, hinder, or defeat creditors was established, and that the case was brought within the Statute of Elizabeth and within sub-sec. 1 of sec. 2 of the Assignments and Preferences Act, R.S.O. 1897, ch. 147.—Review of the authorities.—*Burns v. Wilson* (1897), 28 S.C.R. 207, *Campbell v. Patterson*, *Mader v. McKinnon* (1892), 21 S.C.R. 645, and *Allan v. McLean* (1906), 8 O.W.R. 223, 761, followed.—After the mortgage, the company were allowed to collect the book-debts and to use the proceeds for their business:—*Held*, that there was no advance specially in respect of the book-debts; the whole advance was one transaction; and A. was not entitled to stand in the shoes of the bank and be subrogated to their position in respect of the book-debts; but, if he were, he had lost his security by his own laches, and was not entitled to have his loss made good out of the proceeds of the chattels, to which he had no legal right as against the other creditors.—Judgment of TEET-

ZEL, J., varied. *Stecher Lithographic Co. v. Ontario Seed Co.*, 577.

See TRUSTS AND TRUSTEES.

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See CRIMINAL LAW, 1.

BANKRUPTCY AND INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES—TRUSTS AND TRUSTEES.

BANKS AND BANKING.

1. *Petition for Winding-up—Winding-up Act, R.S.C. 1906, ch. 144, secs. 13 (2), 14—Four Days' Notice—Waiver by Bank—Application of Rules of Practice—Power of Court to Shorten Time—Curator Appointed under Bank Act, secs. 119, 121—Right to Insist upon Statutory Notice—Power to Enlarge Hearing—Other Petitions Pending—Costs.*—The provision of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 13 (2), that "four days' notice shall be given to the company before the making of" an application for a winding-up order, cannot be waived by the company; and, where the full four days' notice has not been given, a Judge has no power to make the order. The Consolidated Rules of Practice are not by any of the provisions of the Winding-up Act made applicable so as to authorise the Court to shorten the time.—Where a curator has been appointed for a bank under the Bank Act, R.S.C. 1906, ch. 29, he is, by secs. 119 and 121, vested with all the powers which directors and solicitor had before his appointment; and, after

the appointment of a curator, the board of directors have no power to give a solicitor authority to consent to a winding-up order or to anything which may have any effect upon the rights and interests of creditors; and a solicitor has no such authority derivable from his former retainer by the bank; and in this case the consent, admission, and waiver of a solicitor, purporting to act on behalf of the bank, though made in good faith, after the appointment of the curator, had no validity.—An application for an order for the winding-up of a bank was refused, the curator objecting to the notice. The Judge might have adjourned the hearing under sec. 14 of the Winding-up Act; but, as there were other applications pending, he considered that the first applicant who was wholly regular should not be deprived of any advantage to which his adherence to the rules, statutes, and practice, entitled him.—The applicant was ordered to pay costs to the curator, who opposed the application, but not to creditors and others who appeared upon the hearing. *Re Farmers Bank of Canada*, 556.

2. *Powers of Provisional Directors—Payment of Commissions for Obtaining Stock Subscriptions—Bank Act; R.S.C. 1906, ch. 29—Breach of Trust—Winding-up of Bank—Liability of Directors to Liquidator—Limitation—Payments not Directly Authorised by one Director.*—The Dominion Act Incorporating the bank, 4 & 5 Edw. VII. ch. 125, was in the form set forth in schedule B of the Bank Act, R.S.C. 1906, ch.

29, and, while it named the provisional directors, conferred no special powers on them:—*Held*, that the powers of the bank, and of the provisional directors acting for it, depended entirely upon the provisions of the Bank Act; and the provisional directors had no power to authorise payment out of the funds of the bank of commissions to persons who obtained subscriptions for shares of the capital stock; and, in the winding-up of the bank, under the Dominion Winding-up Act, they were properly found liable, upon the ground of breach of trust or misfeasance, to pay to the liquidator the sums which had improperly been paid under their authority.—Provisions of the Bank Act considered.—*Quare*, whether even shareholders' directors would have authority under the Bank Act to pay commissions for obtaining subscriptions for stock.—One of the provisional directors did not authorise or direct to be paid any money for commission, except in one instance, when he, with the others, signed a cheque for \$700 "on account of commissions;" at most he was aware of other payments being made by his co-directors:—*Held*, following *Young v. Naval Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K.B. 687, that he was liable for the \$700 only. *Re Monarch Bank of Canada*, 516.

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BASTARD.

See CRIMINAL LAW, 8—WILL, 2.

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See NEGLIGENCE, 1.

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See CONTRACT.

BOOK-DEBTS.

See ASSIGNMENTS AND PREFERENCES, 2.

BOUNDARY.

See TRESPASS.

BUILDINGS.

Encroachment on Highway—Legislative Sanction—47 Vict. ch. 50 (O.)—*Condition—Rebuilding—Party Wall—Removal—Injunction.*]—In 1872 C. was the lessee of a parcel of land in a town, at the corner of P. and S. streets, for the unexpired portion of a term of 50 years from the 20th July, 1843. By a sublease, C., through whom the plaintiffs claimed, leased the southerly 32 feet of this lot to M., through whom the defendant claimed—M., by the instrument, agreeing to construct, upon the land leased to him, a wall extending from P. street easterly upon the north limit of the demised land, which C. was to be at liberty to use as a partition wall for any building he might erect upon the land retained by him, and, for that purpose, to insert beams, joists, etc., in the wall,

spoken of as “the northern wall of M.’s building.” Both buildings were erected as contemplated, the whole of the wall referred to standing on M.’s land. After the erection of the buildings, a survey was made of the town, and it was found that the buildings on P. street, including the two mentioned, encroached 20 inches upon the highway. By 47 Vict. ch. 50 (O.), the survey was confirmed, subject to the provision that, where any building had been erected encroaching upon the highway as shewn upon the plan, it should not be incumbent upon the owner or occupant to remove it off the street until the rebuilding of such building or the repair to the extent of fifty per cent. of the then cash value thereof; and the future occupation of the street was not to be deemed to create or confer any estate therein. In April, 1910, the defendant’s building was destroyed by fire, but the partition wall remained intact:—*Held*, that the effect of the provisions of the sublease was to confer on C. the same right to use the wall as if it were a party wall, and, when it was so used by building into it the beams and joists of C.’s building, it became an integral and necessary part of that building; the right to use the wall as a partition wall, and to fit beams, etc., into it, was more than an easement—it was an interest in the land itself; the plaintiffs were not rebuilding, nor was their building being repaired, and the license conferred by the statute was, therefore, still subsisting, and it was not open to

the defendant to pull down the part of the wall encroaching upon the street; *CLUTE, J.*, dissenting.—Judgment of *MIDDLETON, J.*, affirmed. *Sterling Bank of Canada v. Ross*, 231.

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Alison's Case (1873), L.R. 9 Ch. 1, especially referred to.]—See **ESTOPPEL.**

Amriteswari Debi v. Secretary of State for India (1897), L.R. 24 Ind. App. 33, specially referred to.]—See **ESTOPPEL.**

Anderson's Estate, In re (1906), 16 Man. L.R. 177, remarked upon and distinguished.]—See **WILL, 3.**

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174, 16 S.C.R. 713, specially referred to.]—See **DAMAGES, 3.**

Belcairn, The (1885), 10 P.D. 161, followed.]—See **ESTOPPEL.**

Berkeley v. Elderkin (1853), 1 E. & B. 805, followed.]—See **JUDGMENT.**

Brewer and City of Toronto, Re (1909), 19 O.L.R. 411, followed.]—See **LIQUOR LICENSE ACT, 2.**

Brooks-Sanford Co. v. Theodore Telier Construction Co. (1910), 20 O.L.R. 303, reversed.]—See **MECHANICS' LIENS, 1.**

Burns v. Wilson (1897), 28 S.C.R. 207, followed.]—See **ASSIGNMENTS AND PREFERENCES, 2.**

Campbell v. Patterson (1892), 21 S.C.R. 645, followed.]—See **ASSIGNMENTS AND PREFERENCES, 2.**

Clement, Re (1910), 22 O.L.R. 121, applied.]—See **WILL, 5.**

Coffey v. Scane (1894-5), 25 O.R. 22, 22 A.R. 269, followed.]—See **MALICIOUS ARREST.**

Colville v. Small (1910), 22 O.L.R. 33, affirmed.]—See **CHAMPERTY.**

Comfort v. Betts, [1891] 1 Q.B. 737, followed.]—See **PARTIES, 1.**

Commissioner of Stamps v. Hope, [1891] A.C. 476, followed.]—See **SUCCESSION DUTY.**

Davis v. Hutchings, [1907] 1 Ch. 356, specially referred to.]—See **CONTRACT.**

Dixon v. Bell (1816), 5 M. & S. 198, applied and followed.]—See **NEGLIGENCE, 2.**

Doe Lowry v. Grant (1849), 7 U.C.R. 125, referred to.]—See **WILL, 4.**

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Griffith v. Howes (1903), 5 O.L.R. 439, remarked upon and distinguished.]—See WILL, 3.

Harkin, Re (1906), 7 O.W.R. 840, referred to.]—See WILL, 4.

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Manufacturers Lumber Co. v. Pigeon (1910), 22 O.L.R. 36, reversed.]—See RECEIVER.

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Mills v. Small (1907), 14 O.L.R. 105, distinguished.]—See PARTIES, 1.

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National Trustees Co. of Australasia v. General Finance Co. of Australasia, [1905], A.C. 373, 381, specially referred to.—See CONTRACT.

Noble v. Googins (1868), 99 Mass. 231, approved and followed.—See VENDOR AND PURCHASER, 1.

Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535, followed.—See COVENANT.

North London R.W. Co. v. Great Northern R.W. Co. (1883), 11 Q.B.D. 30, specially referred to.—See INJUNCTION.

Nottawasaga, Township of, and County of Simcoe, In re (1902), 4 O.L.R. 1, applied and followed.—See STATUTES.

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Trecothick Marsh, In re (1905), 37 S.C.R. 79, applied and followed.—See STATUTES.

Trimble v. Hill (1879), 5 App. Cas. 342, 344, referred to.—See JUDGMENT.

Underwood (E.) and Son Limited v. Barker, [1899] 1 Ch. 300, followed.—See COVENANT.

Victorian Railway Commissioners v. Coultas (1888), 13 App. Cas. 222, distinguished.—See DAMAGES, 2.

Walsh v. Lonsdale (1882), 21 Ch. D. 9, not followed.—See INJUNCTION.

Waring v. Waring (1848), 6

Moo. P.C. 341, not followed.]—*See* WILL, 1.

Weisener v. Rackow (1897), 76 L.T.R. 448, followed.]—*See* PARTIES, 1.

Whicher v. National Trust Co. (1909), 19 O.L.R. 605, reversed.]—*See* CONTRACT.

Wilson and Town of Ingersoll, Re (1894), 25 O.R. 439, disapproved.]—*See* LIQUOR LICENSE ACT, 2.

Wollaston v. King (1869), L. R. 8 Eq. 165, referred to.]—*See* WILL, 3.

Woodruff v. Attorney-General, [1908] A.C. 508, referred to.]—*See* SUCCESSION DUTY.

Young v. Naval Military and Civil Service Co-operative Society of South Africa, [1905] 1 K.B. 687, followed.]—*See* BANKS AND BANKING, 2.

CENTRAL PRISON.

See CRIMINAL LAW, 7.

CHAMPERTY.

Action by Assignee of Claim—Agreement to Divide Fruits—Invalidity—R.S.O. 1897, ch. 327, secs. 1, 2—Illegality—Public Policy—Dismissal of Action—Con. Rules 259, 616—Amendment—Parties.]—The plaintiff sued for a money claim absolutely assigned to him by a document which authorised him to sue and recover, and, out of the proceeds, first to pay costs, and then to divide what remained equally between the assignors and assignee. In retaining a solicitor to prosecute the action the plaintiff pledged his own credit, and had no right of indemnity against the assignors:—*Held*, by MIDDLETON, J., a champertous assignment; and champerty is not obsolete, but

is defined, forbidden, and the agreement is made invalid, by R.S.O. 1897, ch. 327, secs. 1 and 2.—When the action is brought by the assignee, in his own name, and the assignment is shewn to be champertous, the Court treats it as “invalid” and void for all purposes; and, the illegality appearing, refuses, upon grounds of public policy, its aid to the plaintiff whose title is tainted by illegality.—*Power v. Phelan* (1884), 4 Dorion (Quebec) 57, approved.—And the action was dismissed upon an issue of law determined under Con. Rule 259 and a motion for judgment under Con. Rule 616.—The judgment of MIDDLETON, J., dismissing the action, upon the ground that it could not be maintained because the plaintiff’s title to the chose in action was asserted under a champertous assignment, was affirmed by a Divisional Court.—The general principle is, that all champertous agreements are void; and, if a party to a champertous agreement must rely upon it to sustain an action, he fails; but, if he, although a party to such an agreement, can make out his case without the agreement, its existence does not void the right of action he has without it: *per* RIDDELL, J.—*Semble*, also, *per* RIDDELL, J., that, apart from authority, there is no moral wrong in such a transaction.—Leave to amend by adding the plaintiff’s assignors or substituting them as plaintiffs, refused. *Colville v. Small*, 33, 426.

CHATTEL MORTGAGE.

See ASSIGNMENTS AND PREFERENCES, 2.

CHOSE IN ACTION, ASSIGNMENT OF.

See CHAMPERTY—PARTIES, 1.

COLLISION.

See RAILWAY.

COMMISSION.

See BANKS AND BANKING, 2.

COMPANY.

1. *Electric Railway Company*—*Powers of Provisional Directors*—*Special Act*, 1 Edw. VII. ch. 92, sec. 9 (O.)—*General Electric Railway Act*, sec. 44—*Payment for Services Rendered in Furtherance of Undertaking*—*Implied Power*—*Contract under Seal*—*Sanction of Shareholders*—*Performance*—*Acceptance*—*Liability of Company*—*Appeal and Cross-appeal*—*Costs.*]—Section 9 of the special Act, 1 Edw. VII. ch. 92 (O.), incorporating the defendant railway company, is an enabling enactment, enlarging the powers of the provisional directors, and authorising them to act for and on behalf of the company to an extent much beyond the scope to which provisional directors are limited by sec. 44 of the Electric Railway Act, R.S.O. 1897, ch. 209. The language of sec. 9 distinctly implies that the provisional directors are authorised, with the sanction of the shareholders, to engage the services of promoters or other persons for the purpose of assisting them in furthering the undertaking; and the power to engage services implies the power to pay or agree to pay for such services. The services of the plaintiffs which were engaged under the agreement sued

upon were within the class of purposes requiring the sanction of the shareholders if the agreement had been to pay in paid-up stock or bonds. If the sanction of the shareholders was necessary in order to make the agreement binding upon the company, it was given in substance.—*Monarch Life Assurance Co. v. Brophy* (1907), 14 O.L.R. 1, distinguished.—Apart from these considerations, the agreement being under the seal of the company, and the services having been rendered in fact by the plaintiffs and accepted in fact by the company, there was ample consideration to support the claim against them for the sum mentioned in the agreement.—*Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, and *Township of East Gwillimbury v. Township of King* (1910), 20 O.L.R. 510, followed.—Judgment of a Divisional Court, 21 O.L.R. 109, affirmed.—The defendant company having appealed from the judgment against them, and the plaintiffs, as the direct result of the company's appeal, having appealed from the dismissal of the action as against the individual defendants, both appeals were dismissed with costs, but the company were ordered to pay to the plaintiffs the costs to be paid by the latter to the individual defendants. *Selkirk v. Windsor Essex and Lake Shore Rapid R.W. Co.*, 250.

2. *Winding-up*—*Mortgage Made within Three Months*—*Presumption*—*Rebuttal*—*Presure*—*Authorisation*—*By-law of Directors*—*Powers*—*Ontario*

Companies Act, secs. 73, 78—Mortgage to Bank to Secure Existing Liability—Erroneous Recital—Objection to By-law—Action by Liquidator.]—The defendants, a chartered bank, advanced \$6,000 to a brewing company in the ordinary course of dealing. Frequent demands for payment having been made, the company agreed to secure the amount by mortgage on their lands, and the directors met and passed a by-law for the purpose of implementing the agreement. The by-law contained a recital that sec. 73 of the Ontario Companies Act authorised the directors to borrow money for the purposes of the company. This assertion was unnecessary, and was also inapplicable, as the directors were not about to borrow or give security for a present loan, but to secure by mortgage an existing liability. Aside from this, the by-law contained all that was necessary to authorise the preparation and execution by the president and secretary of a mortgage to secure the liability of \$6,000:—*Held*, in an action by the liquidator of the company for a declaration that the mortgage was void, that, the debt being an outstanding liability of the company, and the intention and agreement being to mortgage the company's real property, sec. 78 of the Act gave the directors ample power to do so, and all that was needed was that they should act under the powers vested in them by that section; and the by-law was a sufficient authorisation of the mortgage, notwithstanding the recital referring to sec. 73 and the failure to refer to sec. 78.—

Held, also, *per* Moss, C.J.O., that the objection to the by-law was not open to the company, and in this respect the plaintiff, as liquidator under a winding-up order, occupied no higher position. The defendants, having received a mortgage apparently duly executed on behalf of the company, were entitled to assume that everything necessary to its valid execution had been regularly and properly done.—Judgment of SUTHERLAND, J., upon this branch of the case, reversed.—*Held*, also, *per curiam*, that the presumption of intent to defraud the company's creditors, arising from the circumstance that the mortgage was made within three months next preceding the commencement of the winding-up (sec. 94 of the Winding-up Act), was rebuttable, and, upon the evidence, was rebutted, pressure being shewn.—Judgment of SUTHERLAND, J., upon this branch of the case, affirmed. *Hammond v. Bank of Ottawa*, 73.

See ASSIGNMENTS AND PREFERENCES, 2—BANKS AND BANKING, 1, 2—CONTRACT—ESTOPPEL.

COMPENSATION.

See VENDOR AND PURCHASER, 1.

CONFLICTING DECISIONS.

See STATUTES.

CONSENT JUDGMENT.

See ESTOPPEL.

CONSTITUTIONAL LAW.

See MUNICIPAL CORPORATIONS, 2—PHYSICIANS AND SURGEONS.

CONTRACT.

*Advertisement — Company — Redemption of Bonds—Specific Performance — Mortgage Trust Deed—Construction—Breach of Trust—Relief under 62 Vict. (2) ch. 15, sec. 1 (O.)—Damages.] — Held, reversing the judgment of RIDDELL, J., 19 O. L.R. 605, GARROW and MEREDITH, J.J.A., dissenting, that, upon the proper construction of the mortgage trust deed under which the defendants were trustees, they had not, in regard to the acceptance and retirement of bonds offered for redemption, followed the directions of the instrument, and were guilty of a breach of trust, from the consequences of which, though they acted in good faith, they were not relieved by the provisions of the instrument nor by sec. 1 of the Trustee Act, 62 Vict. (2) ch. 15 (O.) The defendants were, therefore, liable to the plaintiff in damages; and the assessment of damages by the trial Judge at \$700 should be adopted.—*Per Moss, C.J.O.*—The whole scope of the instrument was in favour of equality and against discrimination. The obvious intention was to place all holders of bonds, whether large or small in number, upon an equal footing, and to treat all alike. What was actually done was to put upon one side everything that had been done and properly done under the directions of sub-sec. 1 of sec. 12 of art. 2 of the instrument, and to enter into a new transaction for the retirement of the bonds by a process not provided for and not contemplated by the instrument.—In order to avail himself of the benefit of sec. 1 of the*

Trustee Act, it is incumbent upon a trustee to make it appear to the Court, not only that he has acted honestly, but that he has acted reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter. The defendants had no intention to act otherwise than honestly; but it could not be said that they had acted reasonably; and they had not shewn any fair excuse for the breach of trust, nor any reason why the plaintiff, who had committed no fault, should lose his money to relieve the defendants. — *National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A.C. 373, at p. 381, and *Davis v. Hutchings*, [1907] 1 Ch. 356, specially referred to. *Whicher v. National Trust Co.*, 460.

See CHAMPERTY — COMPANY, 1—COVENANT—GIFT—MECHANICS' LIENS, 1, 2—MUNICIPAL CORPORATIONS, 3—NEGLIGENCE, 1—RECEIVER—SALE OF GOODS — SOLICITOR — TRESPASS — VENDOR AND PURCHASER.

CONTRIBUTORY.

See ESTOPPEL.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1—STREET RAILWAYS.

CONVICTION.

See CRIMINAL LAW—LIQUOR LICENSE ACT, 1.

CORROBORATION.

See CRIMINAL LAW, 1, 8—HUSBAND AND WIFE, 1.

COSTS.

Summary Disposition—Master in Chambers — Jurisdiction — Consent of Parties—Appeal — “High Court or any Judge thereof”—Judicature Act, sec. 72—Con. Rule 767 (1)—Judge in Chambers—Order Staying Action—Disposition of Costs—Further Appeal — Discretion — Merits.]—On the 16th May, 1910, the plaintiff began this action, to compel the defendant to convey certain land and for general relief. The statement of claim was delivered on the 9th June, and the statement of defence on the 18th June, after which the defendant was examined for discovery. On the 26th August the solicitors for the defendant sent to the plaintiff's solicitor a conveyance of the property referred to. A conveyance of the property had been made by the defendant's testatrix to the plaintiff, but the making of the affidavit of execution had been, at the plaintiff's request, delayed, and the witness was absent in Europe when the action was begun. The witness returned in August and made the affidavit of execution, whereupon the conveyance was at once sent to the plaintiff's solicitor. Subsequently, on the 1st September, the plaintiff gave notice of a motion to be made before the Master in Chambers “for an order that judgment be entered for the plaintiff for the claims set out in the plaintiff's statement of claim, and for delivery of the papers therein mentioned, and for the costs of this action.” The Master, upon this motion, made an order “that the motion herein made by the plaintiff is

allowed, and the defendant is hereby ordered to pay to the above-named plaintiff the costs of this action.” Upon appeal, an order was made by a Judge in Chambers rescinding the order of the Master, staying the action forever, and providing that there should be no costs to either party. Upon appeal by the plaintiff from that order:—*Held*, by a Divisional Court, that the order of the Master in Chambers was not “an order made by the consent of parties,” within the meaning of sec. 72 of the Judicature Act, which does not apply to an order made *in invitum* where jurisdiction is given by consent.—*Semble*, that, if the order had been one made by consent, there would have been no appeal from it, the Master in Chambers coming within the words “High Court or any Judge thereof,” in sec. 72: *Re Justin, a Solicitor* (1898), 18 P.R. 125.—But it was immaterial whether the Master had or had not jurisdiction: he made an order not “as to costs only,” and such an order is appealable under Con. Rule 767 (1), no other Rule or statute taking away the right of appeal; and, therefore, the appeal was properly heard by the Judge in Chambers.—*Held*, also, that the substantive order made by the Judge (that is, staying the action forever) not being complained of, and being manifestly right, the Court would not interfere with the disposition of the costs made by that order; and, if the merits were considered, the plaintiff, at least, could not complain of the order. *Davis v. Winn*, 111.

See APPEAL — BANKS AND

BANKING, 1—COMPANY, 1—DISMISSAL OF ACTION—SOLICITOR—STREET RAILWAYS—TRESPASS—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER, 2.

COUNSELLING AND PROCURING MURDER.

See CRIMINAL LAW, 8.

COUNSEL'S ADVICE.

See MALICIOUS PROSECUTION.

COUNTY COURT JUDGE.

See STATUTES.

COUNTY COURTS.

See JUDGMENT.

COURT OF APPEAL.

See APPEAL.

COURTS.

See DISMISSAL OF ACTION—JUDGMENT.

COVENANT.

Restraint of Trade—Agreement by Servant not to Engage in Business of a Similar Kind to that of Master—Engaging in one of two Departments of Business—Breach of Covenant—Restriction Extending to the Whole of Canada—Validity—Interests and Requirements of Business—Knowledge of Trade Secrets—Public Policy—Freedom of Contract.—The plaintiffs carried on a compound business: (1) the manufacturing of white-wear and the laundering of it; (2) a general or custom laundry business. The defendant, who had been employed in the laundry department of the plaintiffs' business, and had learned their methods and secret processes, left their em-

ployment in June, 1910, and began to carry on a rival custom laundry business. By a restrictive clause contained in an agreement between the plaintiffs and defendants, made in 1904, the defendant, for good consideration, had become bound, for three years after leaving the employment of the plaintiffs, that he would be "neither directly nor indirectly interested or employed in any way by himself or with by or through any other person in any business of a similar kind to that carried on by the plaintiffs within the limits of the Dominion of Canada:"—*Held*, that the defendant was carrying on "business of a similar kind" to that of the plaintiffs, even though the plaintiffs' laundry should be regarded as ancillary to their manufactory—all was the one business of compound and cognate nature, a material part of which the defendant was injuring.—*Held*, also, that the burden rested on the defendant to shew that the contract was invalid, in that the protection extended beyond what the plaintiffs' interests required, which is the modern test of validity; and, as the evidence shewed that the business of the plaintiffs as a whole extended over all parts of Canada, and as to the laundry branch extended over the greater part of Canada, the covenant not to engage in business "within the limits of the Dominion of Canada" was not too wide for the plaintiffs' protection, and its validity had not been successfully impeached—regard being had, moreover, to the trade secrets and improved methods of the plaintiffs com-

municated to the defendant.—Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.—*Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462, 465, and *E. Underwood & Son Limited v. Barker*, [1899] 1 Ch. 300, followed.—*Henry Leatham & Sons Limited v. Johnstone-White*, [1907] 1 Ch. 189, 322, distinguished.—Judgment of *MULOCK*, C.J. Ex. D., reversed. *Allen Manufacturing Co. v. Murphy*, 539.

See HUSBAND AND WIFE, 2.

CREDITORS' RELIEF ACT.

See ASSIGNMENTS AND PREFERENCES, 1—RECEIVER.

CRIMINAL LAW.

1. *Assisting in Escape of Prisoners—Lunatics Acquitted on Trial for Crimes—Special Verdicts—Detention in Provincial Asylum—Order of Lieutenant-Governor—Sentence of Imprisonment—Lawful Custody—Criminal Code, secs. 192, 966, 969—Conviction—Evidence—Accomplice—Corroboration.*] — The defendant, an attendant in a provincial asylum for the insane, was convicted of assisting two persons to escape therefrom. These persons were confined in the "criminal house" of the asylum, upon an order of the Lieutenant-Governor of the Province, made under sec. 969

of the Criminal Code. They had been charged with the commission of crimes, and, upon trial, had been, in a sense, acquitted; but the acquittal was a part only of the verdicts; they were special verdicts under sec. 966 of the Criminal Code, the full import of which was that each had committed the crime with which he was charged, but was insane at the time, and on that ground only was acquitted. The order at the trial of each was that he be kept in strict custody until the pleasure of the Lieutenant-Governor be known; and the order of the Lieutenant-Governor was that he be conveyed to and detained in the provincial asylum:—*Held*, that Parliament had power to impose the penalty of imprisonment upon one who had the excuse of insanity for his misdeed; that the men were in lawful custody under a sentence of imprisonment for less than life; their escape was one coming within the provisions of the Criminal Code respecting escapes and rescues; and the defendant, in assisting their escape, was guilty of an indictable offence under sec. 192.—*Held*, also, that there was evidence to support the conviction—the testimony of a witness who was said to have been an accomplice being corroborated. *Rex v. Trapnell*, 219.

2. *Carnal Knowledge of Girl under Fourteen—Second Count for Illicit Connection when Girl over Fourteen—Trial of Defendant on both together—Discretion of Trial Judge—Application for Reserved Case—Second Count Struck out after Evidence given on both together*

—*Conviction on First Count—Withdrawal of Evidence from Consideration of Jury—Prejudice — Exhibiting Child of Prosecutrix to Jury—Pointing out Resemblance to Defendant — Admissibility.*]

The indictment against the prisoner contained two counts: (1) under sec. 301 of the Criminal Code, for carnal knowledge in 1907 of a girl under fourteen years of age; (2) under sec. 211, for illicit connection in 1909 with the same girl, then being over fourteen and under sixteen years of age, and of previously chaste character. The trial proceeded on both counts, but at its close the Judge struck out the second count, on the ground that, the girl having sworn to the connection charged in the first count, she was not chaste at the time of the connection charged in the second count. The jury found the accused guilty under the first count. According to the report of the proceedings at the trial, no request was made for separate trials on the two counts; but it was stated in argument that such a request had been made. The jury were plainly told that evidence admitted upon the second count was not admissible upon, and not to be applied to, the first count. The trial Judge recorded a conviction and refused to reserve a case; the defendant asked for leave to appeal and for a direction to the Judge to state a case:—*Held*, that it was within the power of the Court to try the prisoner upon the two counts at the same time (secs. 856, 857, of the Code); it was a matter for the discretion of the trial Judge; if the question

as to the manner of trial was one of law, a reserved case was properly refused; and, if not one of law, there was no power to reserve a case.—*Held*, also, that, as the evidence applicable only on the second count was withdrawn from the jury, the defendant was not, as a matter of law, prejudiced by that evidence, whether admissible or inadmissible on the second count.—During the trial the child of the prosecutrix, the issue, as she swore, of her connection with the accused in 1909, was produced and shewn to the jury, and its resemblance to the defendant pointed out:—*Held*, not improper nor inadmissible.—*Per MEREDITH, J.A.*:—It would be better and more regular to have the likeness testified to by witnesses. *Rex v. Hughes*, 344.

3. *Carnal Knowledge of Young Girl by Householder upon his own Premises—Criminal Code, sec. 217—Application and Scope of—Proof of Knowledge of Age.*]—The defendant was charged with an offence against sec. 217 of the Criminal Code, which provides that “every one who, being the owner or occupier of any premises . . . induces or knowingly suffers any girl under the age of eighteen years to resort to or be in or upon such premises for the purpose of being unlawfully or carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence . . . :”—*Held*, that it was not necessary for the Crown to prove that the defendant knew that the girl was under the age of eighteen

years. — *Held*, also, MACLAREN and MAGEE, J.J.A., dissenting, that it is not an offence, within the section, for the owner of the premises to induce or suffer a girl within the prescribed age to be thereon for the purpose of himself having connection with her; the object of the section is to forbid the use of premises as assignation-houses to which young girls may, or may be induced, to resort; the section is applicable to cases of permission, not commission. *Rex v. Sam Sing*, 613.

4. *Fraudulent Sale of Land Subject to Equity of Redemption—Criminal Code, sec. 421—“Privilege.”*—A charge was laid against the defendant under sec. 421 of the Criminal Code, “for that he did, knowing of the existence of an unregistered privilege, being an equity of redemption in favour of J.W. in” certain land, “fraudulently make a sale of the same with intent to defraud:”—*Held*, by the Court, that the acts of the defendant, as stated in the evidence, did not constitute any offence within the meaning of sec. 421.—*Per* MEREDITH, J.A., that an equity of redemption is not embraced within any of the words, “sale, grant, mortgage, hypothec, privilege, or incumbrance,” in sec. 421.—*Per* MAGEE, J.A., that, upon the evidence, there had not in fact, at the time the prosecution was instituted, been any sale by the defendant. *Rex v. McDevitt*, 490.

5. *Fugitive Offenders Act—Arrest of Person Charged with Offence in another Part of His Majesty’s Dominions—Warrant*

not Indorsed as Provided by sec. 8—Inquiry by Police Magistrate under sec. 12—Committal of Accused to Await Return—Jurisdiction—Habeas Corpus—Lawful Detention—Indorsement of Outside Warrant by Judge of High Court.]—The prisoner was arrested, in the city of Toronto, on a provisional warrant under the Fugitive Offenders Act, R.S.C. 1906, ch. 154, pursuant to a warrant for his apprehension issued by a Justice of the Peace for a county in Ireland, where the offence charged (embezzlement) was alleged to have been committed, and, after an inquiry before the Police Magistrate for the city of Toronto, was committed by him to prison, to await return under the Act. The prisoner was apprehended and brought before the Police Magistrate, and so committed, without the warrant having been indorsed as provided by sec. 8 of the Act. The prisoner obtained writs of *habeas corpus* and *certiorari* in aid, and by the return thereto it appeared that he was detained under the authority of the Police Magistrate’s warrant of commitment. Upon the application for the prisoner’s discharge, the Irish warrant was indorsed by the Judge of the High Court who heard the application:—*Held*, MEREDITH, J.A., dissenting, that the Police Magistrate had no jurisdiction to enter upon the inquiry, and therefore no jurisdiction to commit the prisoner under sec. 12 of the Act; and the prisoner should be discharged.—*Per* MOSS, C.J.O.:—A provisional warrant may be issued before or after the indorsement

of the warrant issued outside of Canada; but sec. 14 makes it plain that a magistrate before whom a person apprehended under a provisional warrant is brought cannot immediately proceed with an investigation. He can only remand from time to time pending the production of an indorsed warrant, which is his authority to enter upon the investigation. The expression "indorsed warrant," frequently occurring in the Act, has more significance than as a term used merely to distinguish it from a provisional warrant. If it was intended to constitute a warrant without indorsement a sufficient authority to the magistrate to proceed, some other expression more distinctly suggestive of that intention would have been used. At all events, it is safer, in dealing with a matter involving restraint of liberty, to adhere to the primary meaning of the language used, in the absence of a context manifestly controlling it and pointing to a different meaning.—*Per* MEREDITH, J.A.:—Upon the proper construction of the Act, an indorsed warrant was not essential to the magistrate's jurisdiction; and, even if sec. 12 required the production, before the magistrate, of an indorsed warrant for apprehension before committing him, the prisoner would not be entitled to his discharge; the warrant having been indorsed by the Judge of the High Court who heard the application for the prisoner's discharge upon the return to the writs, the prisoner was rightly in custody.—Judgment of MEREDITH, C.J. C.P., reversed. *Rex v. Wishart*, 594.

6. *Indictment for Rape—Verdict of "Common Assault"—Competency—Evidence of Previous Unchastity of Complainant—Inadmissibility—New Trial—Stated Case.*—Upon a case stated for the opinion of the Court by the Judge presiding at the trial of the prisoner upon an indictment for rape:—*Held*, in answer to the first question, that upon an indictment for rape a verdict of "common assault" may properly be found: Criminal Code, secs. 14, 298, 951.—2. At the trial the complainant was a witness, and was asked, on cross-examination, whether, before the alleged rape, she had not been living as his wife with the man who afterwards became her husband, which she denied:—*Held*, that evidence of witnesses to contradict the complainant as to this was improperly admitted.—3. *Held*, MEREDITH, J.A., dissenting, that it was unnecessary to answer the third question, *viz.*, whether, in the event of the first question being answered in the negative, there should be a new trial, the first question having been answered in the affirmative.—*Per* MEREDITH, J.A., that, there having been a mistrial through the improper admission of evidence which might have affected the verdict, the Crown was entitled to a new trial. *Rex v. Muma*, 225.

7. *Justices' Conviction for Indictable Offence—Absence of Jurisdiction—Commitment to Central Prison—Habeas Corpus—Order Quashing Warrant of Commitment and Directing Further Detention—Criminal Code, sec. 1120—Meaning and Application of—"In Custody Charg-*

ed with an Indictable Offence.”]

—The defendant was brought before two Justices of the Peace and charged with issuing a false cheque. He pleaded “guilty,” and they convicted him and imposed a sentence of imprisonment in the Central Prison at Toronto. The offence was an indictable one, and not one of those which two Justices are, under Part XVI. of the Criminal Code, authorised to dispose of. Being taken to the Central Prison, the defendant obtained writs of *habeas corpus* and *certiorari* in aid, and, on the papers being returned thereunder, moved for his discharge before CLUTE, J., who made an order quashing the warrant of commitment, but, instead of discharging the defendant from custody, ordered that he should be remanded to the place where he was convicted, and brought before the two Justices for a preliminary hearing on the charge:—*Held*, that the defendant was, when in the Central Prison, “in custody charged with an indictable offence,” within the meaning of sec. 1120 of the Criminal Code, R.S.C. 1906, ch. 146, now amended by 7 & 8 Edw. VII. ch. 18, sec. 14; and an appeal from the order of CLUTE, J., was dismissed.—*Per* MEREDITH, J.A., that the order could not be supported under sec. 1120; but that, apart from that enactment, there was power to remand the defendant so that he might be dealt with according to law upon the charge originally made against him; that the proper order would be one discharging him out of his present custody and providing for his proper return to his former

custody, so that the proceedings which were properly begun against him might be properly continued. *Rex v. Frejd*, 566.

8. *Murder—Counselling and Procuring—Illegitimate Child—Evidence—Intimacy of Prisoner with Mother of Child—Admissibility—Improper Relations with other Men—Inadmissibility—Accomplice—Corroboration—Direction to Jury.*—The prisoner was tried and convicted upon a charge of having murdered an unnamed child of which one Mary D. had been delivered. The child was actually put to death by its mother; the case of the Crown against the prisoner was that he counselled and procured her to do the act, and so rendered himself a party to and guilty of the crime. Mary D. was the principal witness for the Crown; she gave evidence that the child was the prisoner’s and that he had instructed her to strangle it and afterwards to dispose of its body and that she carried out his instructions. Evidence was offered by the Crown, and admitted, tending to shew the intimacy of the prisoner with Mary D. for a period long prior to the birth of the child. Evidence was offered on behalf of the prisoner, and rejected, tending to shew the intimacy of Mary D. with other men, both before and immediately after the murder:—*Held*, that the evidence offered on behalf of the Crown was properly admitted.—*Per* MOSS, C.J.O., that it was important for the Crown to shew such a set of facts and circumstances as might reasonably lead to the existence of a motive on the part

of the prisoner to be rid of the child; and the jury were also at liberty to draw from these facts and circumstances such inferences as were proper with regard to the prisoner's influence over the woman.—*Held*, also, that the evidence offered on behalf of the prisoner was not material, and was properly rejected.—*Semble*, *per* MEREDITH, J.A., that if it had been shewn that the prisoner was made aware of the intimacy of the woman with other men, it might have been admissible in answer to the evidence of motive.—*Held*, also, that the evidence given by the Crown afforded some corroboration of the testimony of the woman; and that the Judge's direction to the jury as to corroboration of her testimony, she being an accomplice, was unobjectionable from the prisoner's standpoint; the weight to be attached to the evidence was for the jury; and they were at liberty to convict upon the woman's evidence alone if they felt convinced of her truthfulness. *Rex v. McNulty*, 350.

9. *Neglecting to Provide Necessaries for Wife—Previous Acquittal on Like Charge—Evidence of Conduct before Acquittal—Inadmissibility—Lawful Excuse—Inability of Prisoner—Evidence—Submission to Jury.*]

—The defendant was in September, 1910; tried and convicted on a charge of refusing, neglecting, and omitting, without lawful excuse, to provide necessaries for his wife, by means whereof her health was then and was likely to be permanently injured. In July, 1909, the defendant had been brought before a magistrate on a charge of neglect

and non-support of his wife, under the same provisions of the Criminal Code upon which the subsequent prosecution was founded, and, electing to be tried summarily, was, after trial, acquitted by the magistrate. At the trial in September, 1910, evidence was admitted, against objection on the defendant's behalf, tending to shew harsh conduct towards and neglect of his wife by the defendant, before the former trial and acquittal, and the effect upon her health, the ground of admission being that such conduct might or would have some bearing on her then (September, 1910) condition of health:—*Held*, that the evidence was improperly admitted.—The defendant gave evidence on his own behalf, and, amongst other matters, deposed as to his ability to earn money and the means at his command to enable him to support or provide necessaries for his wife:—*Held*, that the trial Judge should have told the jury that, in case they were satisfied that the defendant had not the ability to provide necessaries for his wife, they could find him "not guilty," and the question of his ability should have been left to the jury. The question of lawful excuse is to be determined upon all the facts and circumstances, the onus being upon the Crown. *Rex v. Yuman*, 500.

10. *Unlawful Taking or Enticement of Child—Criminal Code, sec. 316—Offence Committed by Father—Decree of Foreign Court Awarding Custody to Mother—Validity—Jurisdiction—Domicile—Absence of Fraud or Collusion.*]

The decree of a foreign Court,

having jurisdiction over the parties and subject-matter, awarding the custody of a child of six years old to his mother, is of such validity and effect in Ontario—no fraud or collusion being shewn—as to render the child's father liable, under sec. 316 of the Criminal Code, to conviction for the offence of unlawfully taking or enticing away the child with intent to deprive the parent (mother) of the possession thereof.—The Courts will recognise the validity of a divorce granted by a Court of the country where the parties were legally domiciled at the time when the proceedings were taken, although the decree was founded upon causes which would not be considered sufficient in an English Court. *Rex v. Hamilton*, 484.

See LIQUOR LICENSE ACT, 1—
NEGLIGENCE, 2—PHYSICIANS AND
SURGEONS.

CROWN PATENT.

See TIMBER—VENDOR AND
PURCHASER, 2.

DAMAGES.

Fraud and Misrepresentation
—*Sale of Creameries—Measure*
of Damages—Difference between
Purchase-price and Fair Value
—*Loss of Profits in Opera-*
tion by Purchasers—Find-
ing of Fair Value—Evid-
ence—Appeal—Loss in Opera-
tion in Year Preceding Sale
—*Proof—Destruction of Books*
—*Omnia Præsumuntur con-*
tra Spoliatorem.—The plain-
tiffs alleged that they were in-
duced to purchase from the de-
fendant two creameries, relying
upon certain representations of
the defendant and his agent as

to the output, expenses, and pro-
fits of the creameries for the
year 1904-5, which were, as they
alleged, false and fraudulent.
By the judgment in the action,
a reference was directed to as-
certain and state what damages,
if any, the plaintiffs had sus-
tained by reason of the fraud
referred to in the pleadings:—
Held, that the true measure of
the damages was the difference
between the purchase-price of
the creameries and their actual
value at the time they were pur-
chased; and that damages for
the loss sustained by the plain-
tiffs in the operation of the
creameries should not have been
allowed by the Master upon the
reference.—Review of English
and American authorities.—The
purchase-price of the cream-
eries was \$4,830, and the Master
found that their fair value at
the time of the purchase was
\$900, and he assessed the dam-
ages (irrespective of loss in oper-
ation) at \$3,930, the difference
between these two sums, and in-
terest thereon from the date
of payment of the purchase-
price:—*Held*, upon the evi-
dence, that the creameries
had no value as creameries
at the time they were sold
to the plaintiffs, and that
there was no reason to differ
from the finding of the Master
that \$900 was the fair value of
the land, buildings, and machin-
ery.—*Held*, also, upon the evi-
dence that, instead of a profit as
was represented, there was a con-
siderable loss in operating the
creameries in 1904-5. To shew
this, the plaintiffs were not ob-
liged to trace to the last pound
the quantity of butter that went
out from the two creameries;

there would have been no doubt as to that matter, had the books of the defendant not been destroyed; and the plaintiffs were warranted in invoking the maxim *omnia præsumentur contra spoliatorem*.—Report of the Master affirmed, except as to the damages for loss in operation. *Lamont v. Wenger*, 642.

2. *Street Railway—Collision of Street-car with Railway Engine—Injury to Passenger—Physical Shock—Resulting Nervous Condition—Jury—Direction to.*—The plaintiff, an elderly man, was a passenger in a street-car of the defendants, which was negligently allowed to come into collision with an engine at a railway crossing. By force of the collision he was violently thrown from his seat over to the back of the next seat in front of him. No bones were broken, and there was no great bruising or other external injury. He got off the car without assistance and walked a short distance, and then, as he said, “collapsed,” and for a time could go no further. Eventually he reached the place where he was employed, but was quite unable to work, and was obliged to go to his home and to bed, where he remained off and on for several weeks under a physician’s care. Subsequently, the condition of traumatic neurasthenia developed, as the result, it was said, of the shock of the collision, and the plaintiff, it was asserted, was still suffering from that trouble at the time of the trial. A physician testified that the physical shock suffered excited the subsequent condition, and that that condition did not arise purely

from an effect created on his mind:—*Held*, that the case was different from those in which the mental shock, as from fright and the like, was the primary cause to which resulting physical consequences had to be traced—the shock in this case was not primarily mental at all, but physical; the trial Judge properly refused to direct the jury to assess separately the damages resulting exclusively from mental shock and those resulting from physical injury; and a judgment for the plaintiff for \$1,500 damages assessed by the jury should not be disturbed.—*Victorian Railways Commissioners v. Coultas* (1888), 13 App. Cas. 222, *Henderson v. Canada Atlantic R.W. Co.* (1898), 25 A.R. 437, and *Geiger v. Grand Trunk R.W. Co.* (1905), 10 O.L.R. 511, distinguished. Judgment of FALCONBRIDGE, C.J.K.B., affirmed. *Toms v. Toronto R.W. Co.*, 204. .

3. *Workmen’s Compensation for Injuries Act, sec. 7—Death of Workman—Action by Widow—Assessment of Damages by Jury—Deduction of Insurance Moneys—Correction of Verdict—Judgment.*—In an action under the Workmen’s Compensation for Injuries Act, by the widow and administratrix of a man who was killed while in the employment of the defendants, to recover damages as compensation for his death, the evidence shewed that the damages, based upon an estimate of the wages for three years of a person in the same grade as the deceased, would amount to at least \$2,200. Counsel for the plaintiff, however, in addressing the jury,

told them that they should deduct from the amount they found on that basis a sum of \$1,000 which the plaintiff had received for insurance on the life of the deceased. The jury announced a verdict of \$1,200, not saying that they had found \$2,200 and deducted \$1,000; but the trial Judge asked them if that was what they meant, and they said it was:—*Held*, having regard to sec. 7 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, that the \$1,000 ought not to have been deducted; and that, upon the findings of the jury, judgment should be entered for \$2,200.—*Beckett v. Grand Trunk R.W. Co.* (1885), 8 O.R. 601, 13 A.R. 174, 16 S.C.R. 713, and *Grand Trunk R.W. Co. v. Jennings* (1888), 13 App. Cas. 800, specially referred to. *Dawson v. Niagara and St. Catharines R.W. Co.*, 69.

See CONTRACT—FATAL ACCIDENTS ACT—HUSBAND AND WIFE, 2—MALICIOUS ARREST—NEGLIGENCE, 1—NUISANCE—SALE OF GOODS.

DEATH.

See DAMAGES, 3—FATAL ACCIDENTS ACT—STREET RAILWAYS.

DECLARATORY JUDGMENT.

See HUSBAND AND WIFE, 1—LIQUOR LICENSE ACT, 2.

DEED.

Conveyance of Land in Fee Simple—Exception or Reservation—Construction—“Mines of Minerals”—“Springs of Oil”—Rock or Coal Oil—Natural Gas—Powers of Canada Company—Mining Powers—License—

Right of Entry—Statutes of Limitations—Evidence—Trespass.]—By deed of bargain and sale dated the 22nd January, 1867, the defendants the Canada Company conveyed to the plaintiff's predecessor in title land in the township of Tilbury East, in fee simple, “excepting and reserving to the said company, their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress, and regress, to and for the said company, their successors, lessees, licensees, and assigns, in order to search for, work, win, and carry away the same, and for these purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damage actually occasioned.” The grantee entered into possession and occupation of the land, and he and those claiming under him had since occupied and cultivated it. In December, 1905, the Canada Company granted a license to the other defendants (oil companies) to prospect and bore for mineral oil and natural gas upon the lands in question and other lands. In July, 1907, the oil companies obtained oil in the land next to that in question, and the Canada Company made a lease to the oil companies on the 3rd August, 1907, embracing all the mineral oil and natural gas, whether already discovered or not, lying or being in or under the lot, with liberty to enter, etc., and providing for a royalty to be paid to the Canada Company;

and, pursuant thereto, the oil companies entered upon the plaintiff's land against his will and began to operate for oil and gas and to remove it. When the grant was made, in 1867, there was no oil issuing from the ground on this lot, and between 1867 and the 10th August, 1907, there was no entry on the land by the Canada Company, or those claiming under that company, for the purpose of searching or boring for oil or gas. The action was for the trespass begun on the 10th August, 1907, and subsequently continued:—*Held*, that it was not open to the plaintiff, claiming under the grant of the Canada Company and having his *locus standi* in Court based thereon, to attack the exception and reservation in the deed as inconsistent with the powers of the company, and therefore null and void; and, further, that there was no inconsistency, as the purchaser had occupied, farmed, and cultivated the property for forty years, and the exercise of the mining rights did not destroy the *solum*; and it was proper for the company to reserve the mineral rights under the surface with a view of disposing of that part of what they possessed to the best advantage, and at the same time disposing of the surface rights for agricultural purposes.—*Held*, also, that this kind of subterranean property is not within the purview of the Statutes of Limitations, as the possession of the surface-owner is not adverse to or inconsistent with the possession in law of the subjacent proprietor.—And *held*, that the language of the exception and reservation was to be

construed according to its primary and natural signification, assisted by the light of co-existing circumstances, and also by oral or other testimony in the case of ambiguous or technical terms; and, so construing it, what was reserved consisted of “mines of minerals” and “springs of oil;” and, all that had been found of mineral character under the land being rock oil and petroleum gas, the oil came under the express reservation of “springs of oil in and under the land,” but the gas did not come under the term “mines of minerals,” not having been so regarded by the parties when the deed was executed in 1867; and, therefore, there was a valid reservation of all oil upon the lot, which was to be possessed and enjoyed by the oil companies, but there was no reservation of natural gas, which remained the property of the land-owner.—History of the development of the oil and gas fields of western Ontario as bearing upon the meaning of the reservation and its application to conditions existing at different periods. *Farquharson v. Barnard Argue Roth Stearns Oil and Gas Co.*, 319.

See CONTRACT—HUSBAND AND WIFE, 2.

DEPOSITIONS.

See TRUSTS AND TRUSTEES.

DEVISE.

See WILL, 4, 5.

DIRECTORS.

See BANKS AND BANKING, 2—COMPANY, 1.

DISCRETION.

See DISMISSAL OF ACTION.

DISMISSAL OF ACTION.

Order Postponing Trial on Payment of Costs—Automatic Dismissal of Action on Default—Extension of Time for Payment after Default—Jurisdiction—Judge in Court—Divisional Court—Appeal—Con. Rule 353—Action, when “out of Court”—Discretion.—After the trial of this action had been begun, the plaintiff applied for an adjournment, which was granted, upon terms of payment to the defendants of certain specified costs. The order was that the costs should be paid within ten days after taxation, and that, in default of payment within that time, “the action be and the same is hereby dismissed without costs.” The costs were not paid within ten days after taxation, and the trial Judge, on the last day, extended the time until the second day thereafter at noon. About 12.40 on the last-named day the amount of the costs was offered to the defendants’ solicitors, and refused. The plaintiff then moved in the Weekly Court for an order further extending the time for complying with the original order:—*Held*, by MIDDLETON, J., upon that application, that, as the original order was so framed that, upon the happening of the default, the action stood dismissed without further order, what was sought was not merely an extension of time, but that the action, which the trial Judge had dismissed, should be restored; and that could be done only by an appellate Court.—The application was refused;

but MIDDLETON, J., gave leave to the plaintiff to appeal from the original order to a Divisional Court, and extended the time for so appealing, two months having elapsed since the original order was made.—The plaintiff appealed pursuant to such leave, and an order was made by a Divisional Court allowing the appeal and varying the original order by extending the time for payment of the costs for one week from the date of the order of the Divisional Court.—From that order the defendants appealed to the Court of Appeal:—*Held*, by the Court of Appeal (MEREDITH, J.A., dissenting), that the action was not so entirely out of Court that it was not subject to the power of the Court or a Judge, under Con. Rule 353, to extend the time for appealing from the order, and to the power of the Court upon appeal to rescind or vary the order. The Divisional Court might have refused to entertain the appeal, either on the ground that the plaintiff, by acting under the order to the extent to which he had done so, had waived his right to appeal, or that by his delay the plaintiff had forfeited all right to an extension of time; but, notwithstanding these objections, the Court, in the exercise of its discretion, heard the appeal and made the order; and the discretion exercised should not be interfered with; the order was authorised by Con. Rule 353, and the defendants were not seriously prejudiced.—*Held*, also, that the action was not out of Court for all purposes; it was out of Court to the extent of disabling the plaintiff from taking

any step other than towards procuring an extension of time for performance of the condition, or, failing that, for an extension of the time for appealing from the original order.—*Per* MEREDITH, J.A., that the order of the Divisional Court was wrongly made: first, because the plaintiff had no right of appeal against the original order; second, because the terms of the order were in the discretion of the trial Judge, and the discretion was not unwarrantably exercised; and, third, because there was really no appeal—it was merely a subterfuge to obtain an extension of the time; and the Divisional Court had no power to extend the time. *Strati v. Toronto Construction Co.*, 211.

See CHAMPERTY—ESTOPPEL.

DISTRESS.

See ASSESSMENT AND TAXES—
INJUNCTION.

DIVISION COURTS.

See JUDGMENT.

DIVISIONAL COURT.

See DISMISSAL OF ACTION—
STATUTES.

DIVORCE.

See CRIMINAL LAW, 10.

DOMICILE.

See SUCCESSION DUTY.

DRAINAGE.

See STATUTES.

DURESS.

See GIFT.

EASEMENT.

See LIMITATION OF ACTIONS.

ELECTION.

See WILL, 3.

ELECTRIC RAILWAY COMPANY.

See COMPANY, 1—STREET
RAILWAYS.

ELECTRICITY.

See NEGLIGENCE, 1.

ENCROACHMENT.

See BUILDINGS.

ENTICEMENT.

See CRIMINAL LAW, 10.

EQUITABLE EXECUTION.

See RECEIVER.

EQUITY OF REDEMPTION.

See CRIMINAL LAW, 4.

ESCAPE.

See CRIMINAL LAW, 1.

ESTOPPEL.

Res Judicata—*Company*—*Winding-up*—*Contributory*—*Action for Calls*—*Dismissal*—*Consent Judgment*—*Grounds for*—*Ascertainment*—*Evidence outside of Pleadings and Judgment.*]—The rule of the common law, “that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court,” is difficult of application since the Judicature

Act, by reason of the uncertainty which may exist as to what was really determined in the former suit; but, in order to ascertain whether the judgment in the former suit is a bar, the Court may look outside the judgment and the pleadings.—*Ripley v. Arthur* (1902), 86 L.T.R. 735, *Alison's Case* (1873), L.R. 9 Ch. 1, *Maharaja Jagatjit Singh v. Rajah Sarabjit Singh* (1891), L.R. 18 Ind. App. 165, *Amriteswari Debi v. Secretary of State for India* (1897), L.R. 24 Ind. App. 33, and *Russell v. Place* (1876), 94 U.S. 606, specially referred to.—A judgment by consent is in the same position as a judgment pronounced after the trial of an action.—*In re South American and Mexican Co., Ex p. Bank of England*, [1895] 1 Ch. 37, and *The Belcairn* (1895), 10 P.D. 161, followed.—An incorporated company brought an action against McK., as the holder of shares of the capital stock, to recover money alleged to be due by him in respect of calls. McK. pleaded several defences—among others, that he was not the holder of the shares, and that the calls were not duly made. The action came on for trial, and, upon consent, a judgment dismissing it was pronounced, signed, and entered. Afterwards, the company being in liquidation under a winding-up order, the liquidator sought to make McK. a contributory in respect of the same shares upon which the calls had been made:—*Held*, that, as it was impossible from the pleadings and judgment to ascertain upon which of the grounds of defence McK. succeeded, the Court might look

at the admissions made before the Referee in the winding-up proceedings; and those admissions, coupled with the judgment and record, warranted the conclusion that the ground upon which McK. succeeded in the action was that he was not a shareholder in the company; and, therefore, the former recovery was a bar to the claim of the liquidator, which was based upon its being established that McK. was a shareholder at the commencement of the winding-up. *Re Ontario Sugar Co., McKinnon's Case*, 621.

See HUSBAND AND WIFE, 2.

EVIDENCE.

Telephone Conversation between Parties—Testimony of Person Hearing Words of one Party — Admissibility — New Trial.—It appeared in evidence that there were communications by telephone, on a given day, at a given time, between one of the plaintiffs and one of the defendants in regard to the matters in question in the action; but what was said by one was denied by the other. It was sought to elucidate what was said by the defendant by calling witnesses who heard his words as spoken into the telephone receiver, though the witnesses could not affirm to whom he spoke or that he was in fact speaking to any person:—*Held*, that the evidence of the proposed witnesses was relevant, and therefore admissible, though the value of it might be little or nothing.—*McCarthy v. Peach* (1904), 186 Mass. 67, approved.—Judgment of SUTHERLAND, J., 2 O.W.N. 222, set aside; and a new trial ordered.

Warren Gzowski & Co. v. Forst & Co., 441.

See CRIMINAL LAW, 1, 2, 6, 8, 9—DAMAGES, 1—DEED—ESTOPPEL—FATAL ACCIDENTS ACT—HUSBAND AND WIFE, 1—MALICIOUS ARREST—MALICIOUS PROSECUTION—TRESPASS—TRUSTS AND TRUSTEES—WILL, 4, 5.

EXCEPTION IN DEED.

See DEED.

EXECUTION.

Seizure of Ship under Fi. Fa.—*Ship Wrongfully Brought by Execution Creditor into Sheriff's Bailiwick*—*Foreign Waters*—*Trespass—Public Policy—International Law—Ashburton Treaty, art. VII.—Abuse of Process of Court.*]—The defendant, having a judgment against the plaintiffs for the recovery of a sum of money, and having a writ of *fi. fa.* in the hands of the Sheriff of Essex, procured or connived at the cutting loose of a foreign vessel owned by the plaintiffs, lying at a dock upon the foreign side of the river St. Clair, and the bringing of the vessel into Canadian waters, within the bailiwick of the Sheriff, for the express purpose of enabling the Sheriff to make a seizure, which he did under the defendant's writ:—*Held*, that what the defendant did or procured to be done was against public policy, and was a trespass, if not a crime, and the defendant ought not to be permitted to take advantage of his own wrong; and so the vessel was not exigible in execution, and the seizure was an abuse of the process of the Court, and should be released.—*Semble*,

that, if art. VII. of the Ashburton Treaty applied to the channel between Detroit and Windsor, it would not prevent the seizure of a foreign vessel properly within the bailiwick of the Sheriff of Essex. *Houghton v. May*, 434.

FALSA DEMONSTRATIO.

See WILL, 4, 5.

FATAL ACCIDENTS ACT.

Death of Young Man Caused by Negligence—Pecuniary Loss of Parents—Reasonable Expectation of Benefit—Damages—Jury—Evidence—Excessive Amount—Duty of Appellate Court—New Assessment.]—A lad of twenty, a brakeman employed by the defendants, was killed in a collision upon the railway, by reason of the negligence of the defendants' servants, and this action was brought under the Fatal Accidents Act, R.S.O. 1897, ch. 166, by the administrators of his estate, to recover damages for his death, for the benefit of his parents, who lived in England. The claim was made and the assessment of the damages was based upon the principle of the Workmen's Compensation for Injuries Act. The jury found that the estimated earnings of a person in the same grade as the deceased, in the like employment, in this Province, for the three years allowed by the statute, would be \$1,800, and they assessed the damages at that sum, apportioning them between the father and mother. The evidence shewed that the deceased was unmarried; had been about four years in Canada, and about a month in the service of the

defendants. He had corresponded with his mother, but had sent his parents no money. He had received a good and rather expensive education, at his father's expense, and the father swore to an understanding between the son and the parents that the son would, in consideration of the large sum so expended, assist the parents in their old age:—*Held*, that the plaintiffs' right of recovery was limited in amount to the pecuniary loss which it could be fairly and reasonably found that the parents had suffered by the son's death; and, upon the evidence and in all the circumstances, taking into account the uncertainties and contingencies, there was such a reasonable and well-founded expectation of pecuniary benefit as could be estimated in money so as to become the subject of damages; but, having regard to all these matters, the award of damages was excessive and extravagant, and therefore unreasonable; and there should be a new assessment of damages, unless the parties could agree upon some amount.—It is the plain duty of the Court to see that an award of damages, in an action of this kind, which appears to have been arrived at upon considerations not warranted by the evidence, shall not stand.—Principles upon which damages to be assessed pointed out. *London and Western Trusts Co. v. Grand Trunk R.W. Co.*, 262.

FIERI FACIAS.

See EXECUTION.

FIREARMS.

See NEGLIGENCE, 2.

FOREIGN MORTGAGES.

See SUCCESSION DUTY.

FOREIGN WATERS.

See EXECUTION.

FRAUD AND MISREPRESENTATION.

See DAMAGES, 1—TRUSTS AND TRUSTEES.

FRAUDULENT SALE OF LAND.

See CRIMINAL LAW, 4.

FUGITIVE OFFENDERS ACT.

See CRIMINAL LAW, 5.

GIFT.

Undue Influence—Duress—Absence of Independent Advice—Ante-nuptial Agreement—Statute of Frauds.—F., being an unmarried man, a Roman Catholic, and an inmate of a hospital governed by members of a Roman Catholic society, and having an insurance of \$1,000 upon his life, payable to his father and brother, a few days before his death declared to the parish priest that he wished the hospital, the defendants, to have the insurance moneys, and that he intended to carry this out by making the plaintiff his wife and appointing her the beneficiary of the policy, she undertaking to pay \$500 to the defendants. The marriage ceremony was performed by the priest; F. made a will in favour of the plaintiff, and designated her as beneficiary under the insurance policy, in lieu of his father and brother. After the marriage, F. stated to the parish priest, in answer to a question put by the latter, in the presence of the plaintiff, that it was his (F.'s)

wish and intention that \$500 of the insurance money should go to the plaintiff and \$500 to the hospital, and the plaintiff assented to this. After the death of F., the plaintiff, who was also a Roman Catholic, under pressure from the Mother Superior of the Society and the priest, executed an irrevocable power of attorney, in favour of a solicitor, instructed by the Mother Superior; the solicitor collected the insurance moneys and paid \$500 to the plaintiff and \$500 to the defendants, less expenses. The plaintiff had no independent advice, did not know what her rights were, and said that when she was asked to execute the power of attorney she remembered that the priest had told her not to "damn her soul for money" and was "scared:"—*Held*, assuming the existence of an ante-nuptial agreement, that, not being in writing, it was void under sec. 4 of the Statute of Frauds, and the benefit of the appointment in the plaintiff's favour passed to her free from any obligation or trust arising out of the parol agreement. The plaintiff, by executing the power of attorney and acquiescing in her attorney paying half of the insurance moneys to the defendants, made a gift to the defendants; the relations of the parties and the circumstances cast the onus on the defendants of shewing that this gift was the free act of the plaintiff; that onus had not been discharged; on the contrary, the evidence shewed that an undue advantage was taken of the plaintiff's situation; she was not a free agent, and had not that protection to which she was en-

titled; and, in such circumstances, it was the duty of the Court to afford her such protection by undoing the transaction.—Judgment of the County Court of Leeds and Grenville reversed. *Finn v. St. Vincent de Paul Hospital, Brockville*, 381.

See WILL.

HABEAS CORPUS.

See CRIMINAL LAW, 5, 7.

HUSBAND AND WIFE.

1. *Action for Declaration of Nullity of Marriage—Jurisdiction of High Court of Justice—Parties Related within Prohibited Degrees*—7 Edw. VII. ch. 23, sec. 8—*Absent Defendant—Service of Writ of Summons—Evidence—Want of Corroboration.*]—The High Court of Justice has no jurisdiction to declare a marriage invalid and void upon the ground that the parties are related within the prohibited degrees—as, in this case, that the husband is the brother of the wife's deceased husband.—The *dictum* of BOYD, C., in *Lawless v. Chamberlain* (1889), 18 O.R. 296, is *obiter*, and is not to be extended to such a case as this.—*Hodgins v. McNeil* (1862), 9 Gr. 305, approved.—*Semble*, that, when the Ontario Legislature, by 7 Edw. VII. ch. 23, sec. 8, assumed to confer jurisdiction upon the Court to declare that a valid marriage was not effected, in such a case as there specified, it went to the extreme limit, if it did not overstep its powers.—Judgment of LATCHFORD, J., dismissing the action, affirmed, upon grounds other than those stated by him.—*Per* LATCHFORD, J.:—Proper service upon the de-

fendant of the writ of summons was not effected; and, the case being heard in his absence, the uncorroborated evidence of the plaintiff, who appeared to be an unreliable witness, did not justify a judgment declaring the marriage void. *May v. May*, 559.

2. *Agreement by Husband to Convey Wife's Land—Conveyance by Husband—Wife Joining to Bar Dower—Mistake—Claim for Rectification—Innocent Misrepresentation—Estoppel—Specific Performance—Statute of Frauds—Breach of Covenant—Damages—Absence of Proof of Loss.*]—The defendants were husband and wife. The husband, on the 17th October, 1904, being the owner of land, mortgaged it for \$2,800, the wife joining to bar dower. On the 4th August, 1905, he executed another mortgage upon the land for \$1,000, the wife again joining for the same purpose. On the 16th November, 1906, he conveyed the land, subject to the mortgages, to the wife. This conveyance was registered on the 7th December, 1906. The defendants lived together, occupying the land. On the 13th March, 1908, the plaintiff made an oral agreement with the husband for the purchase of the east half of the land for \$3,200. The plaintiff was to assume the \$2,800 mortgage and give his promissory note for \$400 and interest. Nothing was said about the \$1,000; apparently it was to be paid off by the husband. The wife was present during the negotiation and took part in it, not as a contracting party, but as assenting. Upon

the same day a conveyance from the husband to the plaintiff, the wife joining to bar dower, was executed by the defendants, and delivered to the plaintiff, and the note signed and given to the husband. This action was brought for rectification of the deed:—*Held*, by BRITTON, J., the trial Judge, that, upon the evidence, there was no fraud on the part of either of the defendants; but that, at the time of the negotiation with the plaintiff, the wife had absolutely forgotten the deed of the 16th November, 1906; that she did not stand by and allow her husband to sell, knowing that the land was hers; and she was not, therefore, estopped from setting up any defence that was available to her. Treating the action as one for specific performance of a contract, it must fail against the wife, the owner of the land; there was no contract with her; the Statute of Frauds was, as to her, a good defence; for the deed signed by her merely to bar dower was not intended by her to authenticate any contract for the sale by her of land to the plaintiff; and there was no part performance by her.—*Held*, also, *per* BRITTON, J., that the plaintiff was not entitled to recover damages against the husband for breach of the covenant for quiet possession contained in the conveyance of the 13th March, 1908.—*Held*, by a Divisional Court, affirming the judgment of BRITTON, J., that the plaintiff could not seek relief on any other ground than that of estoppel; and, no tangible detriment having resulted to the plaintiff, the defendants should not be prevented from proving what

was the real transaction. There was a mistake common to both sides—a misunderstanding arising out of ignorant silence on the part of the wife—and it has not yet been decided that a married woman is to be held bound by an innocent misrepresentation. The conveyance not having been registered, the note being returned to the plaintiff, and no loss having been sustained by the plaintiff, or attempted to be shewn, neither party had suffered except from the litigation, and the Court should leave them as they were. *Lacroix v. Longtin*, 506.

See CRIMINAL LAW, 9, 10—
GIFT.

ILLEGALITY.

See CHAMPERTY.

IMPROVEMENTS.

See VENDOR AND PURCHASER,
2.

INDEMNITY.

See PARTIES, 2—SALE OF
GOODS.

INDEPENDENT ADVICE.

See GIFT.

INDICTMENT.

See CRIMINAL LAW, 6.

INFANT.

See CRIMINAL LAW, 2, 3, 10—
NEGLECTANCE, 2.

INJUNCTION.

Interim Order—*Judicature Act*, sec. 58 (9)—“*Just and Convenient*”—*Landlord and Tenant*—*Distress for Rent*—*Injunction against*—*Grounds for*—*Remedy by Replevin*—

Rent not Payable at a Time Certain.—Before the *Judicature Act*, when a tenant desired to dispute his landlord's right to distrain, his only remedy, if he desired to prevent a sale, was to replevy the goods; he could not resort to equity for an injunction. And even since the *Judicature Act*, although the Court has the power, by sec. 58 (9), to grant an injunction when “just and convenient,” it will only do so when formerly the Court of Chancery would have done so.—*Shaw v. Earl of Jersey* (1879), 4 C.P.D. 120, and *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, are not now to be regarded as authoritative upon the right to an injunction.—*North London R.W. Co. v. Great Northern R.W. Co.* (1883), 11 Q.B.D. 30, and *Kitts v. Moore*, [1895] 1 Q.B. 253, specially referred to.—Of the grounds stated for continuing an interim injunction restraining a landlord from proceeding with a distress, the first depended upon a disputed question of fact, the second was as to an omission which the landlord could remedy, and the third rested upon a legal proposition which was not clear or indisputable:—*Held*, that, in these circumstances, it would not be “just and convenient” to grant an injunction and deprive the landlord of his security, unless some other equally good were substituted; replevin was a cheaper, more just, and more convenient remedy.—*Quare*, whether there is a right to distrain when the rent is not payable at a time certain. *Neal v. Rogers*, 588.

See BUILDINGS—NUISANCE.

INSANE DELUSIONS.

See WILL, 1.

INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES—TRUSTS AND TRUSTEES.

INSURANCE.

See DAMAGES, 3—WILL, 3.

INTERNATIONAL LAW.

See EXECUTION.

INTERPLEADER.

See ASSIGNMENTS AND PREFERENCES, 1.

INTOXICATING LIQUORS.

See LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, 1.

JOINT NEGLIGENCE.

See STREET RAILWAYS.

JUDGMENT.

Action in County Court on Division Court Judgment — Lack of Finality — Court of Record — Authority of Previous Decisions — County Court Appeal.]—A judgment of a Division Court cannot be enforced by action in a higher Court, because the obligation to pay thereby created is not an absolute obligation, but is subject to the discretion vested in the Judge to defer payment in certain circumstances; and the fact that a Division Court is now a Court of record makes no difference in that respect.—*Berkeley v. Elderkin* (1853), 1 E. & B. 805, *McPherson v. Forrester* (1854), 11 U.C.R. 362,

and *Donnelly v. Stewart* (1866), 25 U.C.R. 398, followed.—*Per* BOYD, C., that the state of the law is unsatisfactory, but the earlier decisions, which have stood for more than fifty years, must be followed.—*Per* RIDDELL, J., that a Court sitting in appeal from a County Court decision, being the final Court, is not bound by previous decisions; but the decisions of the Court of Appeal in England are binding (*Trimble v. Hill* (1879), 5 App. Cas. 342, at p. 344); and *Berkeley v. Elderkin*, 1 E. & B. 805, has been approved by the Court of Appeal in *The Queen v. County Court Judge of Essex* (1887), 18 Q. B.D. 704.—Judgment of the County Court of the County of Hastings affirmed. *Crowe v. Graham*, 145.

See DAMAGES, 3—ESTOPPEL—LIQUOR LICENSE ACT, 2—MALICIOUS ARREST—STATUTES—VENDOR AND PURCHASER, 2.

JURISDICTION OF FOREIGN COURT.

See CRIMINAL LAW, 10.

JURISDICTION OF HIGH COURT.

See DISMISSAL OF ACTION—HUSBAND AND WIFE, 1—SALE OF GOODS.

JURISDICTION OF JUSTICES OF THE PEACE.

See CRIMINAL LAW, 5.

JURISDICTION OF MASTER IN CHAMBERS.

See COSTS.

JURISDICTION OF POLICE MAGISTRATE.

See CRIMINAL LAW, 5.

JURISDICTION OF TOWN- SHIP COUNCIL.

See MUNICIPAL CORPORATIONS,
2.

JURY.

See CRIMINAL LAW, 2, 8, 9—
DAMAGES, 2, 3—FATAL ACCI-
DENTS ACT—MALICIOUS PROSE-
CUTION—NEGLIGENCE, 2—STREET
RAILWAYS.

JUSTICES OF THE PEACE.

See CRIMINAL LAW, 7.

LACHES.

See ASSIGNMENTS AND PRE-
FERENCEs, 2.

LANDLORD AND TENANT.

See INJUNCTION.

LEAVE TO APPEAL.

See STATUTES.

LICENSE.

See DEED—LIQUOR LICENSE
ACT—MUNICIPAL CORPORATIONS,
2—TIMBER.

LIEN.

See MECHANICS' LIENS.

LIFE INSURANCE.

See DAMAGES, 3—WILL, 3.

LIMITATION OF ACTIONS.

R.S.O. 1897, ch. 133, secs. 4,
5(1), 8—Adverse Possession—
Dispossession — Discontinuance
of Possession — Exclusion of
True Owner — Occupation of

Surface—Maintenance of Roof
Projecting over Land in Dispute
—Entries by True Owner—Ac-
quisition of Title, Subject to
Easements.]—Under the Real
Property Limitation Act, R.S.O.
1897, ch. 133, secs. 4, 5 (1), and
8, the ten years limited by sec.
4 begin when the true owner is
dispossessed or discontinues pos-
session; the possession to be re-
lied upon by the claimant must
be such as involves the exclu-
sion of the true owner; the oc-
cupant of the surface of the
soil may obtain a title to that
surface, while the true owner
retains an easement therein,
and, subject to such easement,
the statutory title is *usque ad
cælum*; and the right of a per-
son to have his eaves or roof
project over another's land is
an easement.—Therefore, where
the defendant claimed title by
possession to a strip of land one
foot wide, lying between the
plaintiff's house and front fence
and the true boundary line sep-
arating the adjoining lots of the
plaintiff and defendant front-
ing on a city street, and it was
not disputed that the defendant
had acquired a title to the strip
by the statute unless the acts of
the plaintiff in maintaining the
roof of her house projecting
over the strip, or her entries
upon the strip, prevented such
title accruing:—*Held*, that the
maintaining of the roof was not
such a circumstance as to pre-
vent the defendant's exclusive
possession, and that all the acts
done by the plaintiff, in person
or by agent, in entering upon
the strip, were attributable to
the easement of access, support,
etc.; and it was declared that
the defendant had acquired the

fee in the strip, subject to the two easements of maintenance of the roof and of the right of access and support for painting, etc., the side of the plaintiff's house and fence next to the strip.—*Marshall v. Taylor*, [1895] 1 Ch. 641, followed. *Rooney v. Petry*, 101.

See DEED — MUNICIPAL CORPORATIONS, 3—TRESPASS.

LIQUOR LICENSE ACT.

1. *Conviction for Second Offence in Absence of Accused—Inquiry as to First Offence—Construction of sec. 101—Imperative or Directory—“And not before”*—9 Edw. VII. ch. 82, sec. 20.—*Summary Convictions Act*, sec. 2.—*Criminal Code*, secs. 718, 722.]—The defendant was charged with a second offence against the Ontario Liquor License Act, and was, in his absence, though duly summoned, convicted thereof before a magistrate, and sentenced to be imprisoned. Section 101 of the Act, as found in R.S.O. 1897, ch. 245, provides that in such a case the magistrate shall in the first instance inquire concerning the subsequent offence only, and, if the accused be found guilty thereof, he shall then, *and not before*, be asked whether he was so previously convicted; but, if he denies or does not answer, the magistrate shall then inquire concerning the previous conviction. The words “and not before” were struck out by the amending Act 9 Edw. VII. ch. 82, sec. 20. By sec. 718 of the Criminal Code, when the defendant has been duly summoned, if he fail to appear, the magistrate may pro-

ceed with the trial *ex parte* or may issue his warrant and adjourn the trial until the defendant is apprehended. Section 721 provides that, if the defendant is personally present, he shall be asked to plead. These sections are made applicable to offences against Ontario statutes by the Summary Convictions Act, R.S.O. 1897, ch. 90, sec. 2, unless in any Act “hereafter passed it is otherwise declared:”—*Held*, reversing the order of MIDDLETON, J., discharging the defendant upon *habeas corpus*, that the magistrate had jurisdiction to convict the defendant in his absence; the two provisions were neither repugnant nor inconsistent, and should be read together.—*Per* MEREDITH, J.A., that, since the amendment striking out the words “and not before,” the provision of sec. 101, as to asking the defendant whether he was previously convicted, must be regarded as directory only.—*Per* MAGEE, J.A., that the provision is peremptory; but (with some doubt) the section may be construed, in connection with other sections, so as to authorise proceeding in the defendant's absence, if he chooses to absent himself altogether.—History of the legislation and review of the authorities. *Rex v. Cootc*, 269.

2. *Township By-law Limiting Number of Licenses—Time for Going into Operation—“Any Future License Year”*—R.S.O. 1897, ch. 245, sec. 20.—*Application to Future Years—Restriction to Taverns—Repeal of Former By-law—Effect of Declaratory Judgment.*]—On the

11th January, 1909, a township council passed a by-law enacting "that the number of licenses for the sale of intoxicating liquors be limited to three." This action was brought in April, 1910, to obtain a declaration that the by-law was void and of no effect:—*Held*, that the words "for any future license year," in the Liquor License Act, R.S.O. 1897, ch. 245, sec. 20, mean "for any year future as regards the date of the by-law." This interpretation allows the council, if they are dealing with their own year, to deal at the same time with all succeeding years, without depriving the future councils of their power to deal with their years by altering or repealing the by-law. This by-law, being general, applied to the immediately succeeding license year, and to all future years until altered or repealed; and it was not necessary that it should state that it came into operation at the beginning of the then ensuing license year.—*Re Wilson and Town of Ingersoll* (1894), 25 O.R. 439, disapproved.—*Re Brewer and City of Toronto* (1909), 19 O.L.R. 411, followed.—2. That, although the kind of license was not specified, it should be read as applying to tavern licenses only, there being no shop licenses in the township.—3. That the previously existing by-law, restricting the number of licenses to seven, was repealed by this by-law, being inconsistent with it, though words of repeal were not used.—*Semble*, that such a declaration as sought should not, in any event, be made, as, before the time came for the issue of

another set of licenses, a perfect by-law could be passed by the council. *Bourgon v. Township of Cumberland*, 256.

See MUNICIPAL CORPORATIONS, 1.

LOCAL OPTION BY-LAW.

See MUNICIPAL CORPORATIONS, 1.

LOSS OF PROFITS.

See DAMAGES, 1.

LUNATIC.

See CRIMINAL LAW, 1.

MAINTENANCE.

See CHAMPERTY.

MALICIOUS ARREST.

Civil Process—Order for Arrest—Misleading Judge by Affidavit—Suppression of Facts—Absence of Reasonable and Probable Cause—Malice—Intention to Leave Province—Evidence—Statements Made to Judge not in Affidavit—Damages—Discharge of Judgment.—In order to succeed in an action for wrongful and malicious arrest under civil process, the plaintiff must allege and prove that the defendant obtained the order for arrest by some deception practised on the Judge; that he either stated or suggested something that was untrue, or omitted to state something within his knowledge that was material and which would or might have caused the Judge to refuse to grant the order; and also that in applying for the order the defendant acted mali-

ciously, and made the affidavit for the arrest without reasonable and probable cause.—*Coffey v. Scane* (1894-5), 25 O.R. 22, 22 A.R. 269, followed.—The application for the order must be based on sworn, written, evidence contained in the affidavit; and that cannot be eked out by some oral explanation or supplemental information given by the applicant to the Judge upon the *ex parte* application for the order. And, *semble*, oral evidence of statements so made to the Judge would not be admissible upon the trial of the action for wrongful arrest.—The real test is, on the evidence, what was the knowledge possessed by or the information communicated to the creditor at the time he made the affidavit? And that is to be investigated having regard only to what is set forth in the affidavit; the scope of what the creditor knew at that time is the matter to be considered in judging of the reasonable and probable cause for his action.—And where the facts and circumstances in evidence were inconsistent with reasonable and probable cause for making an affidavit that the plaintiff was forthwith about to leave the Province with intent to defraud the plaintiff, and the affidavit produced a false effect by suppression, and was intended to be used for the intimidation of the plaintiff so as to coerce him into making a settlement, which was sufficient evidence of malice, the plaintiff was held entitled to succeed in his action for wrongful arrest.—Damages assessed at \$500, and judgment against the plaintiff (in the action in which the

arrest was made) discharged. *Fitchet v. Walton*, 40.

MALICIOUS PROSECUTION.

Reasonable and Probable Cause — Advice of Counsel or Solicitor — Honest Disclosure of Facts—Bona Fides in Acting upon Advice — Functions of Judge and Jury—Uncontradicted Evidence — Nonsuit.]—In an action for the malicious prosecution of the plaintiff for perjury, it appeared, upon uncontradicted testimony, that the defendant, as soon as he saw the statutory declaration of the plaintiff which contained the statements concerning the defendant (amounting to a charge of fraud or theft) alleged to be false, upon which the prosecution was based, consulted his solicitor, who, before advising, obtained statements from two men who were referred to in the plaintiff's declaration as being ready to substantiate the statements made by him; these men contradicted the plaintiff; the solicitor then placed the whole facts before the County Crown Attorney, who advised an information, which the defendant then laid:—*Held*, there being no evidence upon which a jury could fairly pronounce that the defendant had a guilty knowledge of the fraud charged, or that there was a lack of *bona fides* in what he did in laying the matter before his solicitor, that the trial Judge was right in determining that there was reasonable and probable cause for the prosecution, and in withdrawing the case from the jury and dismissing the action.—*Per* MIDDLETON, J.:—The opinion of counsel honestly obtained, after

a full disclosure of the facts known to the defendant, and honestly acted upon, constitutes reasonable and probable cause for the prosecution, and is not merely evidence either of reasonable and probable cause or in answer to the charge of malice; and in a case where a lawyer of experience and standing is called and shews that he advised the proceedings, and that the facts were fully known to him at the time the advice was given, and the defendant shews that he acted in good faith upon the advice so given, the trial Judge, in the absence of any contradictory evidence, is only discharging his judicial functions when he finds that there was reasonable and probable cause, and enters judgment for the defendant. *Longdon v. Bilsky*, 4.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See COVENANT.

MASTER IN CHAMBERS.

See COSTS.

MECHANICS' LIENS.

1. *Lien of Material-man—Preservation of Lien—Last Delivery—Articles Used for Temporary Purpose—Contract—Registry of Lien—Time—Mechanics' and Wage-Earners' Lien Act, sec. 4—“Furnishes any Materials to be Used.”*—Under sec. 4 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, ch. 153, it is not enough that the materials are

furnished to be used upon or in the building—the lien attaches only in virtue of materials furnished to be used in the making, constructing, erecting, fitting, altering, improving or repairing the erection or building. The significance of the term “furnishes any materials to be used” is that, unless the materials are furnished by the material-man for the purpose of being used in the building or other work, they cannot be the subject of a lien, even though used.—Where the plaintiffs had contracted to supply the hardware for use in the construction of a building, and the last delivery upon which they relied for preservation of their lien—the registry of the claim of lien being within thirty days of that delivery, but more than thirty days after the last previous delivery of materials—was of certain bolts, of trifling value and used for a temporary or experimental purpose only:—*Held*, that these articles were not furnished in such manner as to enable the plaintiffs to claim a lien for their price upon the land of the owners, within the meaning of the Act; and so the whole claim fell to the ground.—Judgment of a Divisional Court, 20 O.L.R. 303, reversed. *Brooks-Sanford Co. v. Theodore Telier Construction Co.*, 176.

2. *Lien of Material-man—Several Buildings—Entire Contract—Several Owners—Equities—Summary Application to Vacate Lien—Status of Applicant—Registry Act.*—Where one owner enters into an entire contract for the supply of material to be used in several

buildings, the material-man can ask to have his lien, under the Mechanics' and Wage Earners' Lien Act, follow the form of the contract, and that it be for an entire sum upon all the buildings. If the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to shew the facts, and, if the facts cannot be ascertained, less violence will be done to the statute by construing it as indicated than by rendering it nugatory in many instances in which the Legislature apparently intended a lien to exist. And when, after the lien has attached to several distinct buildings, the owner has sold one or more, the equities which then arise between the owners of the several buildings may be worked out upon the principles applied where part of a property subject to a mortgage is sold and the mortgagee seeks to enforce his remedy against both parcels. —Where an action to enforce a lien for material supplied by the plaintiffs under one contract for several buildings was brought against several defendants having separate interests in the land sought to be charged, a summary application by the defendant G., who made the contract with the plaintiffs, and was also alleged to have an interest in the land, to vacate the registry of the lien, upon the ground that there could be no valid lien against several buildings, were dismissed; it being *held*, that it was not so clearly demonstrated that the lien was bad that it should be vacated

upon a summary application by G., who was not in a position to invoke the benefit of the Registry Act.—*Dunn v. McCallum* (1907), 14 O.L.R. 249, distinguished. — Claiming a lien upon too much property will not invalidate it altogether. *Ontario Lime Association v. Grimwood*, 17.

MEDICAL PRACTITIONER.

See PHYSICIANS AND SURGEONS.

MINES AND MINERALS.

See DEED—TIMBER.

MISCONDUCT.

See PHYSICIANS AND SURGEONS.

MISTAKE.

See HUSBAND AND WIFE, 2—VENDOR AND PURCHASER, 1.

MORTGAGE.

See COMPANY, 2—SUCCESSION DUTY—TRESPASS.

MUNICIPAL CORPORATIONS.

1. *Local Option By-law—Voting on—Voters' List Certified by County Court Judge—Ontario Voters' Lists Act—Complaint—Notice of Holding Court—Duty of Clerk—Irregularities—Consolidated Municipal Act, 1903, sec. 204.*]—*Held*, affirming the decision of MEREDITH, C.J.C.P., 21 O.L.R. 582, that the proper voters' list was used at the voting upon the local option by-law in question; and that other slight irregularities were cured by the application of sec. 204 of the Consolidated Municipal Act, 1903.—*Per BOYD, C.*:

—Assuming that two names were wrongly added to the list by the County Court Judge at a Court of Revision held without the notice made a prerequisite by the Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 17, being given—that did not *per se* vitiate the list, and the error would be so trifling as not to affect the result of the voting.—*Per MIDDLETON, J.*:— The Clerk could not go behind the certificate of the Judge, which was conclusive until quashed or otherwise annulled; and any attack upon it after the voting was too late. *Re Ryan and Town of Alliston*, 200.

2. *Powers of Licensing and Regulating—Billiard Tables—By-law—Jurisdiction of Council—Motives Influencing Action—License Fee—Prohibitive Amount—Imposition for Revenue Purposes—Provincial Legislature—Powers of—B.N.A. Act, sec. 92 (9)—Delegation of Powers.*]—Where a township council passed a by-law, under sec. 583, sub-secs. 4 and 5, of the Consolidated Municipal Act, 1903, for licensing and regulating the keeping of billiard tables for hire, and fixing the annual license fee at \$100 per table:—*Held*, that, nothing fraudulent or malicious being shewn or charged against the members of the council, the Court would not quash the by-law upon the allegation that it was passed for the purpose of putting the applicant out of business; the council having dealt honestly with a matter within its jurisdiction, the Court should not inquire into the motives or reasons which in-

fluenced its action.—*Held*, also, that the license fee was not so large as to be in its nature prohibitive.—*Held*, also, that a municipality may impose a license fee with a view to revenue. By the British North America Act, sec. 92 (9), power is given to the Province to make laws in relation to such licenses in order to the raising of a revenue for Provincial, local, or municipal purposes; and when the Province delegated to the municipality the power to make laws regarding "licensing," and also the express power to fix a license fee, without any restriction or limitation, it must be taken to have handed over to the municipality the full power conferred by sec. 92 (9).—*Pigeon v. Recorder's Court and City of Montreal* (1890), 17 S.C.R. 495, 501, 502, followed. *Re Foster and Township of Raleigh*, 26, 342.

3. *Separation of City from County—Special Act*, 1 Edw. VII. ch. 75 (O.).—*Agreement as to Assets—Surplus Funds in Hands of County not Taken into Consideration—Right of City to Share in Fund—Municipal Act, 1903, secs. 21(3), 408—Trust—Enforcement—Statute of Limitations.*]—By 1 Edw. VII. ch. 75 (O.), the Town of Woodstock was erected into and incorporated as a city. On the 10th February, 1900, the city corporation, the plaintiffs, and the Corporation of the County of Oxford, the defendants, entered into an agreement, ratified by by-laws of both corporations, and apparently taken and accepted by both as comprising and settling all questions be-

tween them arising out of the erection of the town into a city, and it was subsequently acted upon and its terms complied with by the plaintiffs until shortly before the commencement of this action, on the 23rd December, 1907. The reason for the action was the discovery by the plaintiffs, as they alleged, that at the time of the erection of the town into a city there was in existence a surplus fund standing to the credit of the defendants, amounting to about \$37,000, which had been collected through the various local municipalities comprising the county, including the town of Woodstock, from the rate-payers thereof, and that, in the negotiations preceding and in the making of the agreement, this surplus fund was not taken into account or dealt with in any respect. By sec. 4 of the statute mentioned it was enacted that "The City of Woodstock shall in all matters whatsoever stand and be in the place and stead of the Town of Woodstock, and all property of every kind and all rights, interests, assets and effects, taxes, rates, dues, revenues, obligations and income now belonging to, or accruing due to, or which may be assessed for by the said town, shall pass, belong to and be the rights, property, assets, effects, taxes, revenues and obligations of the City of Woodstock; . . . the meaning and intention hereof being that in all matters and things the said city shall be and stand in the place of the said town." And the plaintiffs, in virtue of this Act and the Municipal Act, said that they were entitled to receive from

and be paid by the defendants some part of the surplus fund. A charge was made against the defendants of fraud, misrepresentation, or concealment, but this was found against the defendants at the trial, and was not part of the case upon appeal. The plaintiffs did not ask to have the agreement of the 10th February, 1902, set aside, but sought some modification or reformation of its terms:—*Held*, GARROW and MACLAREN, JJ.A., dissenting, that the plaintiffs were not entitled to any relief. —Judgment of MULOCK, C.J. Ex.D., affirmed.—*Per* MOSS, C. J.O.: — However, or through whatever means, the fund was permitted to accumulate—and they are to be assumed not to have been improper or dishonest—it constituted and was a surplus fund. It represented rates received from the municipalities comprising the county, provided for and raised by the county, as prescribed by secs. 402 to 407, inclusive, of the Municipal Act, 1903. Under the provisions of the Assessment Act then in force, these rates were collected by the tax collectors for the various municipalities, and with this duty the councils of the municipalities have nothing to do; it is a statutory obligation which the clerk of the municipality owes to the county and is bound to perform. For several years the sums collected exceeded the estimates, and so, by operation of sec. 408; the balance would form part of the general fund of the county municipality; and no one of the municipalities comprising the county has, as a distinct entity, any property

in or right to an aliquot or even a proportionate part. The surplus fund could not be said to be a trust fund held for the benefit of the plaintiffs, nor did they represent in this action the ratepayers by whom the rates were paid, for the purpose of enforcing any supposed trust in respect of it.—*Per MEREDITH, J.A.*:—No part of the money in question ever was “the property” of the plaintiffs, and they never had any right to it; and any substantial question respecting it lay between the ratepayers from whom it was exacted, if unduly exacted, and the defendants. But, if the plaintiffs had all the rights of the ratepayers of their municipality vested in them, their claim would be barred by the Statute of Limitations; for the levy, as to the yearly excesses, was intentionally made for the purpose of creating a “rest,” and, so dealt with, the claim would be substantially one for money received by the defendants for the use of the plaintiffs. And, if the claim could be regarded as one made against a trustee, in the ordinary sense, it would be barred under sec. 32 of the Trustee Act. — *Per MAGEE, J.A.*:—In the absence of legislative provisions, there was no right to share in the surplus fund; it was not like a sinking fund applicable to the reduction of liabilities; its disposal was absolutely in the discretion of the county council as to what localities in the county it should be expended in; it was impossible to say what proportion of it should, as a matter of justice, be expended in or for the benefit of Woodstock; no

machinery of the Court could ascertain that proportion; and the head of the city corporation, representing that corporation in the negotiations, admittedly abstained from inquiry, thinking that course to be for the benefit of the city, and no advantage was taken by the county representatives.—*Per GARROW, J.A.*:—Without any special provision in the Municipal Act upon the subject, the defendants were trustees of the fund for the various local municipalities who had been made to contribute to it, to the extent of their several contributions; and, no legal appropriation of the fund having been made, it should have been taken into account and the plaintiffs’ share therein allowed, in the settlement consummated by the agreement of the 10th February, 1902. That settlement could not, in the circumstances, be allowed to stand, but must be opened up, unless the parties could agree upon the extent of the relief to which the plaintiffs were entitled, apart from the agreement. The plaintiffs’ claim was not a mere money demand, but an equitable claim, to which the Statute of Limitations would apply only from the time of the discovery, without laches, of the mistake or omission; the discovery was not made until long after the agreement, and within the period of six years before the action began; and, as even those who acted for the defendants in arranging the settlement admitted ignorance of the existence of the fund, the plaintiffs were not guilty of carelessness in not sooner becoming aware of the facts.—*Per MACLAREN, J.A.*:—

It was not disputed that the surplus fund was not taken into account in arriving at what the liabilities or debts of the defendants amounted to, or in determining what portion of such debts it would be just that the plaintiffs should pay, to use the language of sec. 21, sub-sec. 3, of the Municipal Act, 1903, made applicable by sec. 6 of the special Act. The word "debts" in sub-sec. 3 means the net debts after deduction of the moneys on hand set apart for or properly applicable to such debts. The existence of this fund was exclusively within the knowledge of the defendants, and it should have been disclosed, and, not having been disclosed or dealt with in any way, it might now be dealt with and justice done. There was no evidence that the plaintiffs were aware of the existence of the surplus until the defendants undertook to distribute it, and, inasmuch as the defendants did not disclose the fact when they should have done so, the plaintiffs should not be barred by any period short of that fixed by the Statute of Limitations, which had not run if the plaintiffs could not have brought an action before the agreement, as would be the case. *City of Woodstock v. County of Oxford*, 151.

See ASSESSMENT AND TAXES—LIQUOR LICENSE ACT, 2—NEGLIGENCE, 1.

MUNICIPAL DRAINAGE ACT.

See STATUTES.

MURDER.

See CRIMINAL LAW, 8.

NATURAL GAS.

See DEED.

NECESSARIES.

See CRIMINAL LAW, 9.

NEGLECTING TO PROVIDE NECESSARIES.

See CRIMINAL LAW, 9.

NEGLECTENCE.

1. *Electric Current Supplied by Municipality for Lighting Houses—Municipal Light and Heat Act—Municipal Waterworks Act—Board of Commissioners—Statutory Agents of Corporation—Supply of Electricity, where Obtained—Powers of Board—Effect of Exceeding—Defective System—Dangerous Defects—Person Injured in House—High Tension Current—Failure to Exercise Care—Contributory Negligence, Absence of—Remedy in Contract or Tort—Damages—Elements Considered in Assessing.* —In 1903 the defendants, a town corporation, acquired an electric light plant then supplying the town and vicinity. In 1904 the defendants passed a by-law constituting a Board of Commissioners under the Municipal Light and Heat Act and the Municipal Waterworks Act, R.S.O. 1897, chs. 234, 235; and the Board, in and after 1905, took charge of the electrical plant, etc., of the defendants:—*Held*, that the liability of a body created by statute must be determined upon a true interpretation of that statute; and, upon the statutes referred to, the position of the defendants was that of principal, and that of the Board of agent; and the

defendants were liable for damages occasioned by the act of the Board.—*Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, followed.—*Held*, also, that if it were beyond the powers of the Board to get their supply of electricity from a point eight miles distant, it was not open to the defendants, who knew all about it and adopted it, to set up that they were not liable for the acts of the Board; and, even if this manner of procuring power were *ultra vires* the defendants, they could not set up this as an answer to a claim based upon the negligence of their servants, in a business carried on by them for the benefit and with the knowledge of the corporation; and in any case the causative negligence was within the municipality.—On the 8th March, 1910, one of the plaintiffs, a boy, lying in bed in the house of his mother, the other plaintiff, was burned by a current of electricity from the town supply:—*Held*, upon the evidence, that the system was a defective one; that the current which caused the injury was not a low tension current of about 110 volts—a current which, without negligence on the part of the defendants, might have been looked for—but a current of high tension which should not have been in the house at all.—The defendants, having taken it upon themselves to conduct an electric light plant, must conduct it without negligence.—*Quere*, whether the doctrine of *Fletcher v. Rylands* (1866), L.R. 1 Ex. 265, *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, could be applied to electricity.—Any

one dealing in electricity is bound to the public to exercise the utmost degree of care in the construction, inspection, repair, and operation of his apparatus and appliances; the defendants, on the evidence, were not careful in construction, they failed in inspection and in repair; and, without reference to the doctrine of *Fletcher v. Rylands* or the principle of *res ipsa loquitur*, the defendants should be considered liable for negligence.—*Held*, also, that there was no contributory negligence; for, although the bed upon which the boy lay was in an iron bedstead, and the bedstead itself in contact with a radiator, the radiator being in contact electrically with the earth, there was nothing to indicate that such a state of affairs could be dangerous—it was usual and common, and no warning of danger to be anticipated from it had been given.—*Semble*, that supplying the high tension electricity was a breach of contract with the owner of the house, the boy's mother, and she at least could sue in contract.—Damages assessed at \$2,250 for the mother's disbursements on account of the injury to her son and her trouble and inconvenience; and at \$7,500 for the son's injuries—the loss of a hand and two holes burned through his skull to the brain. *Young v. Town of Gravenhurst*, 291.

2. *Sale of Air-gun to Minor—Injury to Person—Duty—Liability—Criminal Code, sec. 119—Unlawful Act—Verdict of Jury—Evidence—Judge's Direction to Jury.*—The defen-

dants sold an air-gun, without ammunition, to a boy of thirteen, who procured ammunition, and used the gun to shoot birds with; while he was engaged in that pastime in a city street, one of the bullets injured the plaintiff, who sued the defendants for damages for her injuries, alleging negligence. The trial Judge left it to the jury to find whether the defendants were negligent in intrusting the gun to the boy, telling them that the question which went to them was wholly one of negligence, and also telling them that, having regard to the provisions of sec. 119 of the Criminal Code, the selling of the gun to the boy might in itself be evidence of negligence. The jury found a general verdict in favour of the plaintiff, and assessed the damages at \$800.—*Held*, that there was evidence for the jury that the plaintiff's injuries were caused by the defendants' negligence; and that there was no misdirection.—*Dixon v. Bell* (1816), 5 M. & S. 198, applied and followed.—*Semle*, also, that the object of sec. 119 was to prevent such accidents as that which happened to the plaintiff; and the trial Judge was right in his view that, apart altogether from the question of negligence, as the gun was sold to the boy in contravention of the provisions of that enactment, the defendants were liable to answer in damages to the plaintiff, the unlawful act being the proximate cause of her injury.—Judgment of BRITTON, J., 20 O.L.R. 639, affirmed. *Fowell v. Grafton*, 550.

See DAMAGES, 2—FATAL ACCI-

DENTS ACT—RAILWAY—STREET RAILWAYS.

NERVOUS SHOCK.

See DAMAGES, 2.

NEW TRIAL.

See CRIMINAL LAW, 6—EVIDENCE.

NONSUIT.

See MALICIOUS PROSECUTION.

NOTICE.

See BANKS AND BANKING, 1—PHYSICIANS AND SURGEONS.

NUISANCE.

Odour from Tobacco Factory—Interference with Enjoyment of Neighbouring Premises—Local Standard—Reasonable User—Remedy—Damages—Injunction—Stay—Opportunity to Abate Nuisance.—The plaintiff complained of the odours arising from the manufacture of tobacco on the defendants' premises as detrimental to his enjoyment of his own neighbouring premises.—*Held*, upon the evidence, that the odours caused material discomfort and annoyance and rendered the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowance for the local standard of the neighbourhood, and therefore constituted a nuisance.—The reasonableness of a defendant's user of his own premises does not affect the plaintiff's rights.—*Held*, also, that, as the comfort and enjoyment of the plaintiff's property was interfered with, he was entitled to an injunction;

damages would not be an adequate remedy.—The operation of the injunction was stayed for six months to enable the defendants to abate the nuisance.—Review of the authorities.—Judgment of *Boyd, C.*, varied. *Appleby v. Erie Tobacco Co.*, 533.

NULLITY OF MARRIAGE.

See HUSBAND AND WIFE, 1.

OIL WELLS.

See DEED.

OMNIA PRAESUMUNTUR CONTRA SPOLIATOREM.

See DAMAGES, 1.

ORDER FOR ARREST.

See MALICIOUS ARREST.

PARENT AND CHILD.

See CRIMINAL LAW, 10—
FATAL ACCIDENTS ACT.

PARTIES.

1. *Action by Assignee-trustee—Absolute Assignment—Status of Plaintiff—Addition of Assignors—Motion in Chambers.*—When an assignment is absolute in form, it is immaterial, as regards the status of the assignee as plaintiff in an action, relying upon his title under the assignment, that the assignee holds in trust, and it is also immaterial that the assignor is himself beneficially interested as an object, or indeed as the sole object, of the trust.—And where an assignment of a claim for money for work done was absolute in form, and the assignee held in trust to divide the proceeds of the litigation between himself

and his assignors, an order, made on the application of the defendant, directing that the assignors be added as plaintiffs, was reversed.—And *held*, that, upon such a motion, it could not be determined that the assignment was a “sham.”—*Comfort v. Betts*, [1891] 1 Q.B. 737, *Weisener v. Rackow* (1897), 76 L.T.R. 448, and *Fitzroy v. Cave*, [1905] 2 K.B. 364, followed.—*Mills v. Small* (1907), 14 O.L.R. 105, distinguished. *Colville v. Small*, 1.

2. *Third Parties—Indemnity or Relief over—Cause of Action against Defendants—Grounds not Applicable to Claim against Third Parties—Trial of Issues—Order for.*—A defendant does not lose the right to have his claim against a third party determined in the action against him because the plaintiff, in addition to claiming upon grounds as to which there is, or may be, a right of indemnity, also alleges other grounds with which the third party has no concern.—The rights of the parties are not to be finally determined on the interlocutory motion for directions except in the plainest cases, and it is enough that the plaintiff has made a claim against the defendant in respect of which there is a *prima facie* claim to relief over.—And where the plaintiff sued a railway company for damages for the death of her husband from an injury received from a train upon a siding in the yard of a lumber company, and alleged obstruction of the spaces on each side of the siding as one of several causes of the injury, and the

railway company claimed indemnity or relief over from the lumber company, as third parties, by reason of the agreement of the latter to keep these spaces free from obstruction, an order of the Master in Chambers giving directions for the trial of the issues between the railway company and the lumber company, was affirmed. *Pettigrew v. Grand Trunk R.W. Co.*, 23.

See CHAMPERTY—SALE OF GOODS—TRUSTS AND TRUSTEES.

PARTY WALL.

See BUILDINGS.

PAYMENT INTO AND OUT OF COURT.

See VENDOR AND PURCHASER, 2.

PHYSICIANS AND SURGEONS.

*College Council—Inquiry into Alleged Misconduct of Registered Practitioner—Ontario Medical Act, R.S.O. 1897, ch. 176, secs. 33, 35, 59—Time-limit—Notice to Accused—Powers of Council—Misconduct Amounting to Indictable Offence—Acquittal by Criminal Court—“Infamous or Disgraceful Conduct in a Professional Respect”—Prohibition—Premature Application—Defence to Charge—Appeal—Powers of Provincial Legislature—Civil Rights.]—The Ontario Medical Act, R.S.O. 1897, ch. 176, sec. 59, provides that “every prosecution under this Act shall be commenced within one year from the date of the alleged offence.”—*Held*, that an inquiry by the Council of the College of Physicians*

and Surgeons of Ontario, or a committee thereof, under secs. 33 (2), 35 (1), into the alleged misconduct of a registered practitioner, is not a “prosecution,” within the meaning of sec. 59, and the time-limit does not apply.—*Held*, also, that, although the proper two weeks’ notice was not given to a registered practitioner of the meeting at which a committee of the Council intended to inquire into his alleged misconduct, the action of the committee in giving time to the practitioner, by adjourning the meeting for more than two weeks, got rid of all difficulty.—Section 33 (1) of the Act provides that “where any registered medical practitioner has . . . been convicted . . . of an offence which, if committed in Canada, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register:”—*Held*, that, under this enactment, and sub-sec. 2 of sec. 33 (as amended by 10 Edw. VII. ch. 77), sub-sec. 4 of sec. 33 (added by 10 Edw. VII. ch. 77), and sec. 35, the Council has power to erase from the register the name of a practitioner for misconduct amounting to an indictable offence, although he has not been convicted of the offence; or for infamous or disgraceful conduct in a professional respect, although the act charged amounts to an indictable offence.—*Held*, also, by RIDDELL, J. (and by a Divisional Court, upon appeal, with some hesitation), that, where the act charged involves

guilt of infamous conduct in a professional respect, and also amounts to a crime, and the person charged has been acquitted of the crime, the Council may, nevertheless, find him guilty of the act and cause his name to be erased from the register.—*Semble*, also, as to the last point, that the application of the practitioner whose conduct was in question for an order prohibiting the Council or committee from proceeding with the inquiry, was premature; for the fact of his acquittal, if an answer at all, was a defence to the charge made against him, and should be presented to the tribunal whose duty it was to make the inquiry; and, as he had the right to appeal from the decision of the Council, no injustice could be done to him.—Order of RIDDELL, J., affirmed.—*Held*, also, by RIDDELL, J., that the inquiry was not a criminal trial, involving punishment for the crime alleged; it was merely for the determination of facts upon which the civil rights of the accused might depend; and, therefore, the provisions of the Act above mentioned were not *ultra vires* the Provincial Legislature. *Re Stinson and College of Physicians and Surgeons of Ontario*, 627.

POLICE MAGISTRATE.

See CRIMINAL LAW, 5.

POSTPONEMENT OF TRIAL.

See DISMISSAL OF ACTION.

PRACTICE.

See APPEAL — BANKS AND

BANKING, 1—COSTS—DISMISSAL OF ACTION — HUSBAND AND WIFE, 1—JUDGMENT — MALICIOUS ARREST—PARTIES—RECEIVER—SALE OF GOODS—SOLICITOR — STATUTES — TRUSTS AND TRUSTEES.

PREFERENCE.

See ASSIGNMENTS AND PREFERENCES.

PRESUMPTION.

See COMPANY, 2.

PRIVILEGE.

See CRIMINAL LAW, 4.

PROFITS.

See DAMAGES, 1—TRUSTS AND TRUSTEES.

PROHIBITION.

See PHYSICIANS AND SURGEONS—STATUTES.

PROMISSORY NOTE.

Instrument Payable on Demand—Negotiation on Day of Date—"Overdue" Note—Bills of Exchange Act, secs. 70, 182.—A promissory note payable on demand was indorsed to the plaintiffs on the day it bore date:—*Held*, that it was not overdue when negotiated so as to affect the plaintiffs as holders with defects of title of which they had no notice.—Sections 70 and 182 of the Bills of Exchange Act considered.—*In re George* (1890), 44 Ch. D. 627, and *Edwards v. Walters*, [1896] 2 Ch. 157, distinguished. *Northern Crown Bank v. International Electric Co.*, 339.

PROVINCIAL LEGISLATURE.

See MUNICIPAL CORPORATIONS, 2—PHYSICIANS AND SURGEONS.

PROVISIONAL DIRECTORS.

See BANKS AND BANKING, 2
—COMPANY, 1.

PUBLIC POLICY.

See CHAMPERTY—COVENANT
—EXECUTION.

RAILWAY.

Collision—Injury to Person on Train—Trespasser—Negligence—Arrangement between Railway Companies—Use of Yard and Tracks.]—The Pere Marquette Railway Company, under an arrangement with the defendants, used the yard and station ground of the defendants at London. A Pere Marquette train came into the defendants' station at London, discharged its passengers, and was proceeding backwards to its destination for the night, when the plaintiff jumped on board, intending to ride a short distance towards his home. He stood upon the rear platform of a car, and was in that position when a collision took place between the train he was on and a car of the defendants, upon a "lead" of the defendants, on which the train was lawfully proceeding, by reason of the negligence of the defendants, whereby the plaintiff was injured:—*Held*, MEREDITH, J.A., dissenting, that the plaintiff, whatever his position as regards the Pere Marquette Railway Company, whether trespasser, occupant at sufferance, or licensee, was not a trespasser upon the rights of the defendants; for the time being the defendants had no right of occupation or passage upon the place where the collision occurred; and

the defendants were liable to the plaintiff in damages for the injuries caused by their negligence.—Judgment of a Divisional Court, 20 O.L.R. 390, affirmed. *Barnett v. Grand Trunk R.W.Co.*, 84.

See ARBITRATION AND AWARD
—COMPANY, 1—DAMAGES, 2.

RAPE.

See CRIMINAL LAW, 6.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS ARREST—MALICIOUS PROSECUTION.

REAL PROPERTY LIMITATION ACT.

See LIMITATION OF ACTIONS.

RECEIVER.

Equitable Execution—Fund not Presently Payable—Money Earned but Pledged for Performance of Contract—Form of Order—Creditors' Relief Act, sec. 25—"Just or Convenient"—Judicature Act, sec. 58, subsec. 9.]—Money had been earned by a contractor with a city corporation for the construction of pavements, in the sense that the construction work was completed, but under the terms of the contract the contractor was bound, without further remuneration than the original contract-price, to maintain the works in perfect repair for a specified time. In default of his making repairs in compliance with notice and demand, the corporation might repair and charge the cost to the contractor, and resort to a percentage of the contract-price to be held by the corporation during

the term for which the contractor was bound to maintain:—*Held*, by MIDDLETON, J., that this fund, though not *debitum in presenti* and so not attachable, could be reached by a judgment creditor of the contractor by means of a receivership order; the position was that the money had been earned and had been pledged by the contractor, by a contract collateral to the construction contract, as security for the performance of that contract, to maintain and repair the work.—An order was made for the appointment of a receiver to receive the fund or any part thereof when it should become payable by the corporation; the order to conform to the requirements of the Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 25 (O.); and the costs to be dealt with as there provided.—Circumstances in which an order for a receiver by way of equitable execution will be made, and the nature and effect of the order, pointed out.—Meaning and effect of the words "just or convenient" in the Judicature Act, sec. 58, sub-sec. 9.—*Held*, by a Divisional Court, reversing the decision of MIDDLETON, J., upon the facts, that the defendant was not in a position to enforce payment to him of the fund in the hands of the city corporation, and the plaintiffs were in no better position, and were not entitled to have a receiver appointed to receive the fund in equitable execution of their judgment against the defendant. *Manufacturers Lumber Co. v. PIGEON*, 36, 378.

RECTIFICATION OF DEED.

See HUSBAND AND WIFE, 2.

REGISTRY LAWS.

See MECHANICS' LIENS.

RELIEF OVER.

See PARTIES, 2.

REPLEVIN.

See INJUNCTION.

RES JUDICATA.

See ESTOPPEL.

RESERVATION IN CROWN PATENT.

See TIMBER.

RESERVATION IN DEED.

See DEED.

RESERVED CASE.

See CRIMINAL LAW, 2, 6.

RESTRAINT OF TRADE.

See COVENANT.

RETAINER.

See SOLICITOR.

REVENUE.

See MUNICIPAL CORPORATIONS,
2—SUCCESSION DUTY.

RULES.

Con. Rule 173.]—See SALE
OF GOODS.

Con. Rule 259.]—See CHAM-
PERTY.

Con. Rule 353.]—See DIS-
MISSAL OF ACTION.

Con. Rule 616.]—See CHAM-
PERTY.

Con. Rule 767 (1).]—See
COSTS.

Con. Rule 777 (3) (a).]
—See STATUTES.

SALE OF GOODS.

Canned Fish—Express War-
ranty—Additional Implied War-

ranty—Fitness for Human Food—Breach—Damages—Third Parties—Claim against Cannors for Indemnity—Undertaking to Protect Vendor—Exclusion of Implied Warranty—Jurisdiction over Third Parties—Place of Contract—Place of Residence—Waiver by Unconditional Appearance—Con. Rule 173—Plea to Jurisdiction—Taking Part in Trial.]—The plaintiffs, wholesale merchants in Ontario, bought from the defendant, a broker in British Columbia, a number of cases of canned fish, the defendant warranting that the goods were free from “blown, burst, dry, and leaks:”—*Held*, upon the evidence, that this warranty had been broken, and the plaintiffs were entitled to damages for the breach.—The plaintiffs claimed further damages, as on an implied warranty that the goods were fit for human food, *i.e.*, reasonably fit for the purpose for which they were intended:—*Held*, that, if a warranty was to be implied, it was not excluded by the express warranty; that the sale was of goods, not specific goods, supplied by a dealer and sold for a particular purpose, *i.e.*, for consumption as human food; and it made no difference that the immediate purchasers were not expected to consume the goods but the reasonably proximate purchaser was to consume them; that the defendant undertook to supply to the plaintiffs goods fit for human consumption, and the implied warranty arose; or the goods were bought by description, from which an implied warranty arose that they were of merchantable quality; and in

either view the defendant was liable upon the implied warranty, and the plaintiffs were entitled to damages for its breach—the goods being, on the evidence, for the most part, unfit for consumption.—Review of the authorities.—The defendant had procured the goods from a canning factory in British Columbia, the canning company, in writing, “undertaking to protect” the defendant “from all legitimate claims for blown, swell, dry, and leaks.” The canning company were brought in by the defendant as third parties, and a claim for indemnity or relief over was made against them. They did not dispute liability for their express warranty, but denied liability upon any implied warranty:—*Held*, that the defendant, being aware of all the risks of bad fish in the lot he was buying, and inspecting the goods with all the risks in his mind, and, after that inspection, being fully alive to all the risks, and thereupon asking for and receiving an express warranty or indemnity, could not set up any warranty to be implied.—It was contended by the canning company that a third party notice could not be served on a party out of the jurisdiction, except in circumstances in which, had he been a defendant in an action by the defendant, he could have been served, and that they were not in that position. The defendant contended that the contract of the canning company was to pay to the plaintiffs the amount of their legitimate claim, and this was a contract to be performed within Ontario:—*Held*, that no action would lie to compel the

canning company to pay the claim of the plaintiffs, and so bring the place of performance within Ontario; nor could it be considered that the plaintiffs were proper or necessary parties to an action by the defendant; the only action would be for a declaration of the rights of the defendant, and that would not have an Ontario *locus*.—*Held*, however, that the canning company, by appearing without protest or objection, had waived their right to object to the jurisdiction; since the passing of Con. Rule 173 any one who does not avail himself of that Rule must be taken as waiving any right he may have to object; although the third parties, in their statement of defence, pleaded to the jurisdiction, that did not help them—their election was made on entering their appearance.—*Seem*, also, that if, without pressure and voluntarily, a party attends the trial and takes part in it, he is not allowed to take advantage of his plea to the jurisdiction, even though that might otherwise be available.—*Held*, also, that there was no evidence that the “residence” of the third parties was not in Ontario. *Grocers’ Wholesale Co. v. Bostock*, 130.

SALE OF LAND.

See VENDOR AND PURCHASER.

SEAL.

See COMPANY, 1.

SEPARATION OF MUNICIPALITIES.

See MUNICIPAL CORPORATIONS, 33.

SERVICE OF PROCESS.

See HUSBAND AND WIFE, 1.

SHAREHOLDERS.

See COMPANY, 1.

SHERIFF.

See ASSIGNMENTS AND PREFERENCES, 1—EXECUTION.

SHIP.

See EXECUTION.

SOLICITOR.

1. *Remuneration for Services—Agreement for Payment—Action to Enforce—No Bill Delivered—Solicitors Act, sec. 34.*—The plaintiffs, as solicitors, rendered certain services to the defendant, their client, and, while they had in their possession a cheque for a portion of the amount recovered by the defendant in respect of the matters to which their services related, an agreement was made (as the plaintiffs alleged) by which the plaintiffs’ charges were fixed at \$1,200. A portion of this was then paid, and, on the faith of the defendant’s promise to pay the balance, the cheque was handed over to him. The plaintiffs now sought to recover the balance remaining due after certain payments made:—*Held*, upon the evidence, that the agreement was made as alleged, and was a fair one; and that, the action being upon the agreement, sec. 34 of the Solicitors Act, requiring the delivery of a bill of “fees, charges or disbursements for business done by a solicitor as such,” was not an answer to it.—*Jeffreys v. Evans* (1845), 14 M. & W. 210, and

Thomas v. Cross (1864), 13 W.R. 166, followed. *Belcourt v. Crain*, 591.

2. *Retention of Client's Money—Promise to Pay "Retainer"—Order for Delivery of Bill of Costs—Motives Inducing Litigation.*—A promise to pay a "retainer"—that is, a preliminary fee given to secure the services of the solicitor and induce him to act for the client—is void; and a solicitor obtaining money for his client is not entitled to retain thereout an amount agreed in writing to be paid to him by his client as a retainer.—When a matter is brought before the Court, the Court can consider only the legal rights of the parties, not their reasons for asking for their rights.—Order of MIDDLETON, J., 21 O.L.R. 255, affirmed. *Re Solicitor*, 30.

See MALICIOUS PROSECUTION.

SPECIFIC PERFORMANCE.

See CONTRACT—HUSBAND AND WIFE, 2—VENDOR AND PURCHASER, 1, 2.

STATED CASE.

See CRIMINAL LAW, 2, 6.

STATUTE OF FRAUDS.

See GIFT—HUSBAND AND WIFE, 2.

STATUTE OF LIMITATIONS.

See DEED—LIMITATION OF ACTIONS—MUNICIPAL CORPORATIONS, 3—TRESPASS.

STATUTES (REFERRED TO).

13 Eliz. ch. 5 (Preferences).

See ASSIGNMENTS AND PREFERENCES, 2.

29 Car. II. ch. 3, sec. 4 (Statute of Frauds).

See GIFT.

30 & 31 Vict. ch. 3, sec. 92 (9) (British North America Act).

See MUNICIPAL CORPORATIONS, 2.

47 Vict. ch. 50 (O.) (Confirming Survey of Town of Cornwall).

See BUILDINGS.

R.S.O. 1897, ch. 24, sec. 4 (1) (a) (Succession Duty Act).

See SUCCESSION DUTY.

R.S.O. 1897, ch. 29, sec. 13 (2) (Free Grant Lands Act).

See TIMBER.

R.S.O. 1897, ch. 36, sec. 39, sub-sec. 2 (Mines Act).

See TIMBER.

R.S.O. 1897, ch. 51, sec. 58 (9) (Judicature Act).

See INJUNCTION—RECEIVER.

R.S.O. 1897, ch. 51, sec. 72.

See COSTS.

R.S.O. 1897, ch. 51, sec. 76 (1) (b).

See APPEAL.

R.S.O. 1897, ch. 90, sec. 2 (Summary Convictions Act).

See LIQUOR LICENSE ACT, 1.

R.S.O. 1897, ch. 133 (Real Property Limitation Act).

See DEED.

R.S.O. 1897, ch. 133, secs. 4, 5 (1), 8.

See LIMITATION OF ACTIONS.

R.S.O. 1897, ch. 147, sec. 2, sub-sec. 1 (Assignments and Preferences Act).

See ASSIGNMENTS AND PREFERENCES, 2.

R.S.O. 1897, ch. 153, sec. 4 (Mechanics' and Wage-Earners' Lien Act).

See MECHANICS' LIENS.

R.S.O. 1897, ch. 160 (Workmen's Compensation for Injuries Act).

See FATAL ACCIDENTS ACT.

R.S.O. 1897, ch. 160, sec. 7.

See DAMAGES, 3.

R.S.O. 1897, ch. 166 (Fatal Accidents Act).

See FATAL ACCIDENTS ACT.

R.S.O. 1897, ch. 174, sec. 34 (Solicitors Act).

See SOLICITOR, 1.

R.S.O. 1897, ch. 176, secs. 33, 35, 59 (Medical Act).

See PHYSICIANS AND SURGEONS.

R.S.O. 1897, ch. 181, secs. 14, 15, 17, 23, 24, 36 (Surveys Act).

See TRESPASS.

R.S.O. 1897, ch. 203, secs. 159, 160 (Insurance Act).

See WILL, 3.

- R.S.O. 1897, ch. 209, sec. 44 (Electric Railway Act).
See COMPANY, 1.
- R.S.O. 1897, ch. 234 (Municipal Light and Heat Act).
See NEGLIGENCE, 1.
- R.S.O. 1897, ch. 235 (Municipal Waterworks Act).
See NEGLIGENCE, 1.
- R.S.O. 1897, ch. 245, sec. 20 (Liquor License Act).
See LIQUOR LICENSE ACT, 2.
- R.S.O. 1897, ch. 245, sec. 101.
See LIQUOR LICENSE ACT, 1.
- R.S.O. 1897, ch. 327, secs. 1, 2 (Champerly and Maintenance).
See CHAMPERTY.
- R.S.O. 1897, ch. 338, sec. 5 (Statute of Frauds).
See GIFT.
- 62 Vict. (2) ch. 15, sec. 1 (O.) (Trustee Act).
See CONTRACT.
- 1 Edw. VII. ch. 75 (O.) (City of Woodstock Act).
See MUNICIPAL CORPORATIONS, 3.
- 1 Edw. VII. ch. 92, sec. 9 (O.) (Incorporating Windsor Essex and Lake Shore Rapid Railway Company).
See COMPANY, 1.
- 3 Edw. VII. ch. 19, secs. 21 (3), 408 (O.) (Municipal Act).
See MUNICIPAL CORPORATIONS, 3.
- 3 Edw. VII. ch. 19, sec. 204 (O.)
See MUNICIPAL CORPORATIONS, 1.
- 3 Edw. VII. ch. 19, secs. 295, 321, 325 (O.)
See ASSESSMENT AND TAXES.
- 3 Edw. VII. ch. 19, sec. 583, sub-secs. 4, 5 (O.)
See MUNICIPAL CORPORATIONS, 2.
- 4 Edw. VII. ch. 23, sec. 103 (O.) (Assessment Act).
See ASSESSMENT AND TAXES.
- 4 & 5 Edw. VII. ch. 125 (D.) (Incorporating Monarch Bank of Canada).
See BANKS AND BANKING, 2.
- 5 Edw. VII. ch. 6 (O.) (Succession Duty Amendment Act).
See SUCCESSION DUTY.
- 6 Edw. VII. ch. 11, secs. 175, 222 (O.) (Mines Act).
See TIMBER.
- R.S.C. 1906, ch. 29, secs. 119, 121 (Bank Act).
See BANKS AND BANKING, 1.
- R.S.C. 1906, ch. 29, schedule.
See BANKS AND BANKING, 2.
- R.S.C. 1906, ch. 37, sec. 204 (Railway Act).
See ARBITRATION AND AWARD.
- R.S.C. 1906, ch. 119, secs. 70, 182 (Bills of Exchange Act).
See PROMISSORY NOTE.
- R.S.C. 1906, ch. 144, secs. 13 (2), 14 (Winding-up Act).
See BANKS AND BANKING, 1.
- R.S.C. 1906, ch. 144, sec. 94.
See COMPANY, 2.
- R.S.C. 1906, ch. 146, secs. 14, 298, 951 (Criminal Code).
See CRIMINAL LAW, 6.
- R.S.C. 1906, ch. 146, sec. 119.
See NEGLIGENCE, 2.
- R.S.C. 1906, ch. 146, secs. 192, 966, 969.
See CRIMINAL LAW, 1.
- R.S.C. 1906, ch. 146, secs. 211, 301, 856, 857.
See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, sec. 217.
See CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, sec. 316.
See CRIMINAL LAW, 10.
- R.S.C. 1906, ch. 146, sec. 421.
See CRIMINAL LAW, 4.
- R.S.C. 1906, ch. 146, secs. 718, 721.
See LIQUOR LICENSE ACT, 1.
- R.S.C. 1906, ch. 146, sec. 1120.
See CRIMINAL LAW, 7.
- R.S.C. 1906, ch. 154, secs. 8, 12, 14 (Fugitive Offenders Act).
See CRIMINAL LAW, 5.
- 7 Edw. VII. ch. 2, sec. 7 (46) (O.) (Interpretation Act).
See TIMBER.
- 7 Edw. VII. ch. 4, sec. 17 (O.) (Voters' Lists Act).
See MUNICIPAL CORPORATIONS, 1.
- 7 Edw. VII. ch. 23, sec. 8 (O.) (Amending Marriage Act).
See HUSBAND AND WIFE, 1.
- 7 Edw. VII. ch. 34, secs. 73, 78 (O.) (Companies Act).
See COMPANY, 2.
- 7 & 8 Edw. VII. ch. 18, sec. 14 (D.) (Amending Criminal Code).
See CRIMINAL LAW, 7.
- 8 Edw. VII. ch. 21, secs. 112, 193 (O.) (Mines Act).
See TIMBER.
- 9 Edw. VII. ch. 35, sec. 14 (O.) (Arbitration Act).
See ARBITRATION AND AWARD.
- 9 Edw. VII. ch. 48, sec. 6, sub-secs. 4, 5 (O.) (Creditors' Relief Act).
See ASSIGNMENTS AND PREFERENCES, 1.
- 9 Edw. VII. ch. 48, sec. 25 (O.)
See RECEIVER.
- 9 Edw. VII. ch. 82, sec. 20 (O.) (Amending Liquor License Act).
See LIQUOR LICENSE ACT, 1.

10 Edw. VII. ch. 64, sec. 14 (O.) (Assignments and Preferences Act).

See ASSIGNMENTS AND PREFERENCES, 1.

10 Edw. VII. ch. 77 (O.) (Amending Medical Act).

See PHYSICIANS AND SURGEONS.

10 Edw. VII. ch. 90, sec. 48 (O.) (Municipal Drainage Act).

See STATUTES.

STATUTES.

Imperative or Directory — Municipal Drainage Act, 1910, sec. 48—Appeal to County Court Judge—Time for Delivering Judgment—Prohibition—Leave to Appeal to Divisional Court—Conflicting Decisions — Con. Rule 777 (3) (a).]—The provision of sec. 48 of the Municipal Drainage Act, 10 Edw. VII. ch. 90, that a County Court Judge, upon hearing an appeal from a decision of a Court of Revision, “shall deliver judgment not later than 30 days after the hearing,” is imperative. —Prohibition to a County Court Judge against the enforcement of a judgment delivered after the lapse of 30 days from the hearing.—*In re Township of Nottawasaga and County of Simcoe* (1902), 4 O.L.R. 1, and *In re Trecothick Marsh* (1905), 37 S.C.R. 79, applied and followed. —*In re Ronald and Village of Brussels* (1882), 9 P.R. 232, and *Re McFarlane v. Miller* (1895), 26 O.R. 516, discussed. —Judgment of MEREDITH, C.J. C.P., reversed.—*Held*, by RIDDELL, J., in granting leave to appeal to a Divisional Court, under Con. Rule 777 (3) (a), upon the ground that there were conflicting decisions, that for the purposes of the Rule decisions of the Judges of the Court of Appeal should be considered de-

cisions of “Judges of the High Court.” *Re Rowland and McCallum*, 418.

See COMPANY, 1 — LIQUOR LICENSE ACT—TIMBER.

STAY OF INJUNCTION.

See NUISANCE.

STAY OF PROCEEDINGS.

See COSTS.

STREET RAILWAYS.

Injury to and Death of Person Crossing Track—Negligence—Excessive Speed of Car—Contributory Negligence—Crossing behind Car without Looking for Approaching Car—Joint Negligence—Ultimate Negligence—Findings of Jury—Costs.]—R. alighted from an east-bound car of the defendants on the south side of Gerrard street, in the city of Toronto, and in attempting to cross the north track of the defendants, opposite the gate of the Toronto General Hospital, which he was about to visit, he was struck by a west-bound car and so injured that he died.—In an action by R.’s executors to recover damages for his death, the jury, in answer to questions, found: that R.’s injuries were caused by the negligence of the defendants, which consisted in excessive speed; that R. could by the exercise of reasonable care have avoided the accident; that R. was negligent “by not looking for approaching car;” that the motorman of the west-bound car, after he became aware, or, if he had exercised care, ought to have been aware, that R. was in a position of danger, could have prevented the accident by the exercise of

reasonable care; and that in that respect the motorman's negligence consisted in "too great a speed."—*Held*, that, as the primary and ultimate negligence of the defendants were one and the same—excessive speed—and as that negligence was concurrent with the negligence of the deceased, there could be no recovery.—No question of ultimate negligence arose upon the findings of the jury.—Upon the findings of the jury, the action was dismissed, but without costs.—*Per* BOYD, C.:—At places like the Hospital the cars should not be driven at such a rate as to imperil those who have to cross the track in the visitation of the sick. *Rice v. Toronto R.W. Co.*, 446.

See COMPANY, 1—DAMAGES, 2.

SUBROGATION.

See ASSIGNMENTS AND PREFERENCES, 2.

SUCCESSION DUTY.

Property of Person Resident in Ontario at Time of Death—Mortgages on Foreign Lands—Specialties—Domicile—Situs of Debts—Succession Duty Act, sec. 4 (1) (a).—The estate of P., who, at the time of his death, was resident in the Province of Ontario, was *held* (GARROW, J.A., dissenting, and MACLAREN, J.A., doubting), liable to succession duty in respect of a large number of mortgages upon real estate situate in the State of Michigan, made in favour of P., and executed by mortgagors who were, at the respective dates of the instruments and the mortgagee's death, resident in Michigan.—*Commissioner of Stamps v. Hope*, [1891] A.C. 476, fol-

lowed.—Judgment of the Judge of the Surrogate Court of the County of Essex affirmed.—*Per* MOSS, C.J.O.:—The evidence shewed that by the law of Michigan the mortgages were in fact or were to be deemed as in fact instruments under seal creating debts by specialty, and not merely simple contract debts. At the time of P.'s death the mortgages were in his custody in Ontario. Thus, by the artificial rule of law they were *bona notabilia* in Ontario, and, as such, were subject to be, and were in fact, comprised in the list of properties held by the personal representative upon his application for letters in Ontario. Had the instruments been located in Michigan or anywhere out of Ontario at the time of the testator's death, it is quite probable that the rule laid down by the Judicial Committee in *Woodruff v. Attorney-General*, [1908] A.C. 508, would prevail.—*Per* MEREDITH, J.A.:—Such of the debts as were specialties, that is, those in which the debtor had, in the mortgage security, covenanted to pay, were within Ontario, and taxable, because in Ontario at the time of the testator's death; but such as could be sued for on the simple contracts only were without Ontario, and not taxable there, because the debtors resided out of the Province.—*Per* GARROW, J.A.:—P. had not at his death lost his domicile of origin in the State of Michigan, nor acquired a new domicile of choice in Ontario; the tax in question must fall, if at all, within the part of sec. 4 (1) (a) of the Succession Duty Act which imposes a tax upon

the property in Ontario of a person "domiciled in Ontario . . . or . . . elsewhere;" and the mortgages in question were not by anything contained in the statute withdrawn from the operation of the maxim *mobilia sequuntur personam*, attracting and attaching to it the foreign domicile of the testator, and were not in fact or in law "property situate within this Province," within the meaning of that expression in the statute. *Treasurer of the Province of Ontario v. Pattin*, 184.

SURPLUS FUND.

See MUNICIPAL CORPORATIONS, 3.

SURVEY.

See TRESPASS.

TAVERNS.

See LIQUOR LICENSE ACT, 2.

TAXES.

See ASSESSMENT AND TAXES.

TELEPHONE CONVERSATION.

See EVIDENCE.

TESTAMENTARY CAPACITY.

See WILL, 1.

THIRD PARTIES.

See PARTIES, 2 — SALE OF GOODS.

TIMBER.

Mining Lands—Crown Patent—Reservation of Pine—Right of Patentee to Cut for Certain Purposes—Mines Act, R.S.O. 1897, ch. 36, sec. 39—Repeal by Mines Act, 1906—Statutory Privilege

—Saving Clause—Interpretation Act—Rights of Timber Licensee—Excessive Cutting by Patentee—Cutting on one Patented Lot for Use on Another.]

—Patents were issued to the defendants, under the provisions of the Mines Act, R.S.O. 1897, ch. 36, for certain lands, as mining lands, subject to the reservation to the Crown of all the pine trees on such lands, that reservation being controlled by sec. 39 of the Act, sub-sec. 2 of which provided that the patentees might cut and use such trees as might be necessary for building, fencing, and fuel on the lands so patented, or for any other purpose essential to the working of the mines thereon, and all trees required to be removed in actually clearing the land for cultivation. This Act was repealed by the Mines Act of 1906, 6 Edw. VII. ch. 11, sec. 222, with the proviso that such repeal should not affect any rights acquired or any act or thing done under the Act repealed. In the new Act there was a provision as to reservation of timber, sec. 175, the provisions of which, as regards sub-sec. 2, were not the same as those of sec. 39 of the repealed Act. The Act of 1906 was, in turn, repealed by the Mines Act of 1908, 8 Edw. VII. ch. 21, sec. 193, provisions similar to those of sec. 175 of the Act of 1906 being contained in sec. 112. The plaintiffs were licensees from the Crown with power during 1909 and 1910 to cut and remove pine from the lands patented to the defendants:—*Held*, that the defendants, under sec. 39 of the first Act, had legal permission to take such of the trees as were

necessary for the buildings and operations in mining, without let or charge, as long as the limits of the permission were not exceeded. That was a specific statutory right or privilege which was saved upon the general repeal of the first Act, having regard to the proviso in sec. 222 of the Act of 1906, enlarged or elucidated by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-sec. 46. The plaintiffs' cause of action against the defendants was, therefore, limited to any excess of cutting by the defendants.—And *held*, that, in the absence of any such provision as is found, in regard to free grant lands, in R.S.O. 1897, ch. 29, sec. 13, sub-sec. 2, the cutting of the defendants was restricted to the particular lot patented—they could not cut on one patented lot pine trees to be used upon another lot also patented to them. *Gordon v. Moose Mountain Mining Co.*, 373.

TIME.

See BANKS AND BANKING, 1—DISMISSAL OF ACTION—LIQUOR LICENSE ACT, 2—MECHANICS' LIENS, 1—PHYSICIANS AND SURGEONS—STATUTES—VENDOR AND PURCHASER, 2.

TORT.

See NEGLIGENCE, 1.

TREATY.

See EXECUTION.

TRESPASS.

Boundary Line between Lots—*Agreement—Evidence—Statute of Limitations—Possession—Sufficiency to Maintain Action—Ownership Subject to Mortgage—Judicature Act, sec. 58 (4)—*

Proof of True Line—Survey—Method Adopted—R.S.O. 1897, ch. 181, secs. 14, 15, 17, 23, 24, 36—Astronomical Observations—Costs.—The plaintiff owned, subject to a mortgage, lot 33 in the 3rd concession of the township of Alfred, and the defendant lot 34, immediately to the west thereof. Most of the line between these lots was well ascertained, but there was a dispute concerning about six rods at the south; and this action was brought to determine the boundary at that place:—*Held*, that, although part of the line between the two lots had been agreed upon or fixed by the Statute of Limitations, that had no effect in or towards establishing a line in continuation thereof.—It was contended that the defendant had been for more than ten years in possession of the strip of land claimed by the plaintiff, and so had acquired title by the Statute of Limitations:—*Held*, upon the evidence, that there was no exclusive possession: the plaintiff was the rightful owner of his own lot and the defendant of his, and each was in constructive possession up to the true line, wherever that might be.—*Rogers v. Nixon*, unreported decision of a Divisional Court, Queen's Bench Division, 21st December, 1889, followed.—The defendant also contended that the plaintiff had not such possession as enabled him to sue in trespass:—*Held*, that, where one has the paper title to a piece of land and comes upon it and occupies in fact part thereof, he is considered in law in possession of the whole, unless another is in actual physical occupation of

some part to the exclusion of the true owner; here no other person was in actual possession; and the plaintiff had sufficient possession. — *Street v. Crooks* (1856), 6 C.P. 124, distinguished.—*Held*, also, that the fact that the plaintiff was merely a mortgagor was rendered immaterial by the Ontario Judicature Act, sec. 58 (4).—*McMullen v. Free*, unreported decision of a Divisional Court, Chancery Division, 8th January, 1887, followed.—It was also contended by the defendant that the plaintiff had not made out the true line. The original survey of the township was made in 1797. In 1880 H. was appointed by the Lieutenant-Governor to make a survey of the east boundary line of North Plantaganet and the west boundary line of Alfred, from the Ottawa river to the front of the 11th concession. H., in making the survey, placed a stone monument at the north-west corner of the 3rd concession of Alfred, at the place at which an old post had previously been, and another stone monument at the south-west corner of the 3rd concession, and the line between these became the true western boundary of the township, and the governing line: R.S.O. 1897, ch. 181, secs. 14, 15, 17, 23, 24, 36. The road at the south-east corner was rightly placed so that the monument was in the middle of the road. A survey was made for the plaintiff by W., who found these two posts, but, not having heard of H.'s survey, thought the monument at the north was at the true position for the east side of the road, thirty-three feet east of the west boundary of Alfred. The result was that the line which W. found made an angle with the true line of about 1' 43". Then he took a post on the north-east corner of lot 34, admitted to be at the place of the original post, and ran from this a line parallel to the line he had determined from H.'s monuments, thus running the line thirty-three feet east of the true line at the south end of the lot, and taking off certain of the plaintiff's land and putting it on the defendant's lot, of which the plaintiff did not and the defendant could not complain:—*Held*, that the boundary was determined by the line run by W. A Court is not concerned with the question whether the surveyor took the prescribed means for determining his data—he should follow the directions of the statute; the Court is concerned with the facts, and not with the manner of determining the facts. The monuments planted by H. were found by W.; and it was a matter of indifference what method he adopted to satisfy himself that they were real monuments. — *Held*, also, that there is no necessity for finding the true astronomical bearing of the governing line, so long as the line to be run is on the same astronomical course.—*Held*, also, that the plaintiff was entitled to the costs of the action, although the damages assessed against the defendant did not exceed the amount paid into Court by him, the defendant not having admitted the plaintiff's title, which was the main matter in dispute, and there being nothing in the conduct of the plaintiff which should deprive him of

costs.—Judgment of the Junior Judge of the County Court of the United Counties of Prescott and Russell affirmed. *Charbonneau v. McCusker*, 46.

See EXECUTION—RAILWAY.

TRIAL.

See CRIMINAL LAW, 2—DISMISSAL OF ACTION — SALE OF GOODS—TRUSTS AND TRUSTEES.

TRUSTS AND TRUSTEES.

Assignee for Benefit of Creditors—Sale of Estate of Insolvent—Purchase by Agents and Trustees for Assignee—Finding of Fact—Evidence—Appeal—Fraud—Account—Profits on Resale—Sale of Portion of Property—Remedy—Actual Value of Property—Parties—Costs—Depositions of Deceased Defendant—Admissibility—Examination of Witness de Bene Esse—Refusal to Read at Trial.]

—In an action by a creditor of H. against C., the assignee of H. for the benefit of creditors, and two persons to whom C. had purported to sell lands forming part of the estate of H., for an account of profits and for damages, etc.:—*Held*, upon the evidence (MEREDITH, C.J.C.P., *dubitante*), that the conclusion of the trial Judge that the other two defendants purchased as agents and trustees for C. was abundantly justified. — McG., one of the defendants, resold the house bought in his name, at a profit of \$320:—*Held*, that the measure of liability in respect of this transaction was the \$320; interest, occupation rent, and improvements, etc., might be set off against each other. For this sum both C. and McG. were

liable. Upon the evidence, it was in McG.'s hands when the action was begun, and his executors (he having died *pendente lite*) were answerable.—Only part of the parcel bought in the name of the third defendant had been resold; the sale was for \$200:—*Held*, that, if none of the property had been disposed of, the plaintiff's remedy would have been to have it declared that the property still remained subject to the trust and to have an account upon that footing; or he might have had a resale ordered, taking the increased price realised, and holding the defendants to the purchase if no more was realised; but, as part had been sold, the defendant C. was chargeable with the actual value of the estate at the time it was conveyed to the third defendant; any change of circumstances arising from depreciation of the property while in C.'s hands should be borne by him rather than by the *cestuis que trust*.—*Held*, however, that the third defendant was not liable to account upon this head, for, although he had lent himself to a fraud, no profit had reached his hands. He was a necessary and proper party to the action, and should answer along with C. for the plaintiff's costs.—*Held*, also, that the trial Judge had properly refused to admit in evidence, on behalf of the executors of McG., his depositions upon his examination for discovery; and had properly refused to compel the plaintiff to read an examination *de bene esse* taken at his instance, which he did not desire to read; but the defendants should have

the costs of this examination.—
Judgment of LATCHFORD, J.,
varied. *Atkinson v. Casserley*,
527.

See BANKS AND BANKING, 2—
CONTRACT — MUNICIPAL COR-
PORATIONS, 3 — PARTIES, 1 —
WILL, 3.

ULTIMATE NEGLIGENCE.

See STREET RAILWAYS.

UNDUE INFLUENCE.

See GIFT—WILL, 1.

VENDOR AND PURCHASER.

1. *Contract for Sale of Land—City Lot — Misstatement as to Depth—“More or Less”—Deficiency — Innocent Mistake — Specific Performance—Compensation.*—In an agreement for the sale of land by the defendant to the plaintiffs, the land was described as “the premises situate on the north side of R. street, in the city of T., and known as No. 250 R. street, having a frontage on R. street of 36 feet, more or less, by a depth of 110 feet, more or less, to a lane.” The lot was bounded on two sides by streets, and in the rear by a lane, so that its limits were apparent. In fact, the depth was only 98 feet 6 inches. The defendant acted in good faith in describing the lot as having a depth of 110 feet, more or less, and the plaintiffs believed that the depth was about 110 feet. The purchase-price was a bulk sum, not arrived at by an estimate of the value of the property at a price per foot:—*Held*, that the words “more or less,” added to the statement of the depth, controlled that statement, so that the

plaintiffs were not entitled to compensation for the deficiency—the difference not being so great as to raise the presumption of fraud or gross mistake. — *Noble v. Googins* (1868), 99 Mass. 231, approved and followed.—Review of the English authorities. *Wilson Lumber Co. v. Simpson*, 452.

2. *Contract for Sale of Land—Possession Taken by Purchaser — Vendor without Patent for Land—Time of Essence of Contract — Purchaser Failing to Make Payments—Judgment by Default for Possession — Setting aside, on Payment into Court of Balance of Purchase-money — Vendor Treating Contract as Subsisting—Waiver — Improvements Made by Purchaser — Right to Patent—Appeal from Judgment at Trial—Compliance with Terms — Explanation — Right of Appeal — Right of Purchaser to Compel Performance of Contract—Payment out of Court—Costs.*—On the 17th January, 1906, the plaintiff entered into a written agreement with the defendants for the sale to them of land described, for \$600, payable \$100 in cash and the remainder in deferred instalments, the last being due on the 15th January, 1908, with interest. The defendants agreed to pay the purchase-money, and the plaintiff covenanted to convey to them “by a good and sufficient deed, Crown land assignment, all her interest” in the land; and it was “expressly understood that time is to be considered the essence of this agreement, and, unless the payments are punctually made at the time and in the manner above-mentioned, the said

party of the first part is to be at liberty to resell the said lands." One of the defendants, R., went into possession and made improvements of a permanent value. The other defendant assigned his interest under the contract to R. The payments (except the cash payment) were not made in accordance with the terms of the contract, but R. paid at different times various sums amounting to \$320, the last payment being made on the 5th March, 1907. At the time the contract was entered into, R. believed that the plaintiff had obtained a patent for the land, and that she intended to sell the fee simple; but in fact she had no patent. In March, 1907, R. had made permanent improvements to the amount of \$300 in buildings and \$40 in clearing land. After he had made a payment in that month, he found that the plaintiff had not the patent, and he attempted to be located for the land himself; he stopped payment of any further amount to the plaintiff, because she had not the patent. He went on improving the land by clearing to the additional value of \$280. A patent for the land was issued to the plaintiff in 1908. On the 19th December, 1908, the plaintiff began this action for possession of the land and other relief. On the 19th February, 1909, upon a summary application by the plaintiff, R. not appearing, judgment for possession of the land was granted. In the plaintiff's affidavit in support of this application she swore that there was due and owing to her under the agreement, \$470.70, and that she

desired to restrain R. from cutting and selling wood; she did not assert that the contract was rescinded. On the 27th April, 1909, the judgment was, by order made on the application of R., vacated, upon R. paying \$470.70 into Court, which he did, and he was allowed to remain in possession until the determination of the action. Nothing further was done in the action until the 9th May, 1910, when the statement of claim was delivered. In the meantime, on the 26th February, 1910, the Attorney-General brought an action against the plaintiff for the cancellation of the patent, the result of which was that the patent was set aside, but with the understanding that when the improvements were completed a new patent would issue. At the trial the plaintiff insisted that the contract was at an end, and that she was entitled to possession of the land as improved by R.:—*Held*, that the position taken by the plaintiff upon the motion to set aside the judgment, when she asserted that a certain amount was due under the contract, which amount was paid into Court, was inconsistent with that taken at the trial; and, having regard to the non-observance of the time clause in respect of payments subsequent to the first; to the fact that R. entered into possession and continued in possession and made improvements during the period when the time clause was disregarded; to the further fact that the plaintiff continued to treat the agreement as subsisting and claimed the balance due thereon; that the delay was

partly due to the want of title and the proceedings taken by the Attorney-General; that R., in the *bonâ fide* belief that he was the true owner, continued to make improvements after the default judgment had been set aside—and having regard to all the facts and circumstances of the case—the only fair inference was that neither party regarded time as of the essence of the contract, but that both parties treated the time clause as having been waived; and that the plaintiff ought not to be heard at once to affirm the contract, with a view of compelling the defendant to pay into Court the full balance of the purchase-money, and at the trial, when the money was in Court, to take the position that the agreement had been rescinded.—Time, though of the essence of the original agreement, may be waived by a subsequent agreement or by conduct of the parties amounting to waiver; and insisting on the contract after the time limited for completion is an act waiving the right to insist on that time as essential.—By the judgment of the trial Judge, the plaintiff was to have possession, upon the money paid on the contract being returned to R. with interest. R.'s solicitor received from the plaintiff's solicitors a cheque for the amount paid with interest; and upon this the judgment was entered. R.'s solicitor, by an uncontradicted affidavit, explained that the cheque was given and received merely in order to have the judgment entered, so that an appeal therefrom might be proceeded with, and not in satis-

faction or settlement of the claim:—*Held*, that R. had not, by complying with the judgment, waived his right of appeal therefrom.—Judgment of RIDDELL, J., set aside; and the defendant R. adjudged to be entitled to a conveyance of the plaintiff's interest, upon payment to the plaintiff of the full amount of the purchase-money; the defendant's solicitor to return the cheque received; the money in Court with accrued interest to be paid out to the plaintiff; the plaintiff to have her costs up to and inclusive of payment into Court; and no other costs to be paid by or to either party. *Devlin v. Radkey*, 399.

VERDICT.

See DAMAGES, 3.

VOTERS' LISTS AND VOTING.

See MUNICIPAL CORPORATIONS, 1.

WAIVER.

See ARBITRATION AND AWARD—BANKS AND BANKING, 1—SALE OF GOODS—VENDOR AND PURCHASER, 2.

WARRANT FOR ARREST.

See CRIMINAL LAW, 5.

WARRANT OF COMMITMENT.

See CRIMINAL LAW, 7.

WARRANTY.

See SALE OF GOODS.

WILL.

1. *Absence of Undue Influence—Testamentary Capacity—Insane Delusions—Failure of*

Proof of Existence—Effect on Disposition of Property.]—The rule laid down by the Judicial Committee in *Waring v. Waring* (1848), 6 Moo. P.C. 341, that any act done by a person whose mind is unsound on one subject, however rational that act may appear to be, is void, as it is the act of a morbid or unsound mind, no longer prevails.—Since *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549, the rule has been that no insane delusion shall influence the will of the testator in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made. It is a question for the jury whether the delusion affected the disposition.—*Skinner v. Farquharson* (1902), 32 S.C.R. 58, followed.—And in a case in which it was found that there was no undue influence, and the testatrix understood the nature and effects of her act in making a will, the extent of the property disposed of, and the claims to which effect should be given, her will—duly executed in accordance with the law—was upheld, in spite of evidence of insane delusions as to the unchastity of her daughters and other relatives and as to attempts on their part to poison her—those delusions, if they really existed, not having affected the disposition of her property.—And *held*, upon the evidence, that the testatrix was not in fact the victim of the delusions of which evidence was given, but affected to believe evil of persons about her and expressed her affected belief in order to annoy them. *McIntee v. McIntee*, 241.

2. *Construction — Gift to “Children” — Illegitimate Children—Exclusion of Legitimate Children—Surrounding Circumstances.*]—*Held*, affirming the judgment of MULOCK, C.J.Ex.D., 21 O.L.R. 262, upon the construction of the will in question, and having regard to the surrounding circumstances, that the expression “my children” could not be given its *primâ facie* meaning, but must be taken to refer to the testator’s illegitimate children only. *Lobb v. Lobb*, 15.

3. *Construction—Life Insurance in Favour of Wife—Bequest of Insurance Moneys in Trust for Wife during Life—Remainder to Persons not Preferred Beneficiaries—Ineffective Disposition — Insurance Act, secs. 159, 160—Other Benefits Given by Will—Election—General Rule — Exception.*]—The testator had insured his life for the benefit of his wife, and the policy was in force at his death. By his will he purported to give the insurance moneys, sufficiently describing the policy to identify it with that in favour of his wife, to his executors to be held in trust by them for the maintenance of his wife as long as she should live; he also gave other property upon the same trust; and directed that, after her death, the residue of his estate should be divided among certain named persons, none of whom came within the preferred class of the Insurance Act, R.S.O. 1897, ch. 203, sec. 159 (2):—*Held*, that the testator could not make any such disposition of the insurance moneys as he had attempted to do by

his will—the trust declared by sec. 159 (1) of the statute not being displaced by an effective declaration under sec. 160; and the wife was, at his death, entitled to receive the insurance moneys.—It was contended that the will raised an election, and that the wife must either allow the insurance moneys to be disposed of as the will directed or lose all benefit under the will:—*Held*, that the case fell within the “notable exception” referred to by James, V.-C., in *Wolleston v. King* (1869), L.R. 8 Eq. 165; the testator, having the power to appoint to any within the class of preferred beneficiaries, first gave the insurance moneys in trust for the wife as long as she lived—and then over; that he could not do; and the wife was entitled to the insurance moneys, as well as to the other benefits under the will.—*Seem*, that the case would have been different had the insurance moneys been disposed of away from the wife.—*Griffith v. Howes* (1903), 5 O. L.R. 439, and *In re Anderson's Estate* (1906), 16 Man. L.R. 177, remarked upon and distinguished. *Re Edwards*, 367.

4. *Devise of Land not Owned by Testator—Misdescription—Intention—Evidence—Absence of General Words—Land Actually Owned by Testator not Passing.*—The powers of the Courts in giving effect to what they may see, upon the face of the will, was the real intention of the testator, are not unlimited. If the testator has devised land which he did not own, with nothing more in the will to assist, although there is little (or no) doubt that thereby he in-

tended to devise some land he did own, the latter land will not pass, and a well defined rule of law stands in the way of receiving evidence that that lot was intended. But, if there are any words in the will which would be effective to dispose of the land actually owned by the testator if the wrong description were entirely omitted, the land passes, and the wrong description is but *falsa demonstratio*, which may be removed by evidence as a latent ambiguity.—Review of the cases in the Courts of this Province from *Doe Lowry v. Grant* (1849), 7 U.C.R. 125, to *Re Harkin* (1906), 7 O.W.R. 840.—In this case the testator, without using general words shewing an intention to devise all his lands, or any words of that kind, but evidently with the intention of devising land which he owned, specifically devised “the south-west quarter of lot No. 3 in the 4th concession of the township of N. D.” He did not own the south-west quarter of that lot, but he did own the south half of the north half of the lot:—*Held*, that he died intestate in respect of the south half of the north half. *Re Clement*, 121.

5. *Devise of Land not Owned by Testator—Misdescription—Intention—Evidence—Preliminary General Words—Residuary Clause—Land Actually Owned by Testator Passing.*—The testator, by his will, after revoking all previous testamentary dispositions, and directing payment of debts, proceeded thus: “I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following,

that is to say." Then followed two devises, and then the devise in question, to a grandson, of the south-west 50 acres of lot 1, concession 12 of L. A provision was then made for the support of the testator's wife, and a devise and bequest to three grandsons of the residue of the testator's estate. The testator did own 50 acres of lot 1 in the 12th concession of L., not the south-west fifty acres, but land described in the deed as "the south-westerly half of the north-westerly half, otherwise known as the north-west quarter;" and he never at any time owned any other part of lot 1:—*Held*, that, as the testator had used, in the beginning of the will, words efficient to pass the land which he owned if the wrong description were deleted, the devise was effective and the wrong description, *falsa demonstratio*—the presence of the residuary clause making no difference.—The rule laid down in *Re Clement*, 22 O.L.R. 121, applied to a different state of facts. *Smith v. Smith*, 127.

See GIFT.

WINDING-UP.

See BANKS AND BANKING—COMPANY, 2—ESTOPPEL.

WITNESS.

See TRUSTS AND TRUSTEES.

WORDS.

"*And not before.*"]—See LIQUOR LICENSE ACT, 1.

"*Any Future License Year.*"]—See LIQUOR LICENSE ACT, 2.

"*Children.*"]—See WILL, 2.

"*Common Assault.*"]—See CRIMINAL LAW, 6.

"*Furnishes any Materials to be Used.*"]—See MECHANICS' LIENS, 1.

"*High Court or any Judge thereof.*"]—See COSTS.

"*In Custody Charged with an Indictable Offence.*"]—See CRIMINAL LAW, 7.

"*Indorsed Warrant.*"]—See CRIMINAL LAW, 5.

"*Infamous or Disgraceful Conduct in a Professional Respect.*"]—See PHYSICIANS AND SURGEONS.

"*Judges of the High Court.*"]—See STATUTES.

"*Just or Convenient.*"]—See INJUNCTION—RECEIVER.

"*Mines of Minerals.*"]—See DEED.

"*More or Less.*"]—See VENDOR AND PURCHASER, 1.

"*Out of Court.*"]—See DISMISSAL OF ACTION.

"*Overdue.*"]—See PROMISSORY NOTE.

"*Privilege.*"]—See CRIMINAL LAW, 4.

"*Retainer.*"]—See SOLICITOR, 2.

"*Springs of Oil.*"]—See DEED.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See DAMAGES, 3.

WRIT OF SUMMONS.

See HUSBAND AND WIFE, 1.

